S. Hrg. 99-457

ASBESTOS WORKERS' RECOVERY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1265

SEPTEMBER 9, 1985

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ASBESTOS WORKERS' RECOVERY ACT

MONDAY, SEPTEMBER 9, 1985

U.S. SENATE,
SUBCOMMITTEE ON HEALTH,
COMMITTEE ON FINANCE,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m., in room SD-215, Dirksen Senate Office Building, Hon. David Durenberger (chairman) presiding.

Present: Senators Durenberger and Armstrong.

[The press release announcing the hearing, a description of S. 1265 by the Joint Committee on Taxation, and the prepared statement of Senator Armstrong follow:]

[Press Release No. 85-060, Monday, July 29, 1985]

ASBESTOS WORKERS' RECOVERY ACT DUE HEALTH SUBCOMMITTEE HEARING

The Senate Committee on Finance's Subcommittee on Health has scheduled a hearing on S. 1265, the Asbestos Workers' Recovery Act, Chairman Bob Packwood (R-Oregon) announced today.

Senator Packwood said the Subcommittee would review the bill and the issue it addresses in a hearing scheduled to begin at 9:30 a.m., Monday, September 9, 1985.

The hearing is to be in Room SD-215 of the Dirksen Senate Office Building in Washington.

Senator Dave Durenberger, Chairman of the Subcommittee on Health, is to preside at the hearing.

The subject of the hearing, S. 1265, was introduced June 7 by Senator Bill Armstrong (R-Colorado), Senator Claiborne Pell (D-Rhode Island), and Senator Daniel Inouye (D-Hawaii). The Asbestos Workers' Recovery Act would "provide prompt, exclusive and equitable compensation as a substitute for inadequate tort remedies, for disabilities or deaths resulting from occupational exposure to asbestos and for other purposes."

"This hearing's importance is illustrated by the more than 25,000 claimants who have filed asbestos-related lawsuits," Senator Packwood said. "Additionally, litigation over the claims is growing at the rate of over 6,000 new cases each year, emphasizing the need for Congress to accord consideration to S. 1265."

DESCRIPTION OF S. 1265
RELATING TO
PROPOSED ASBESTOS-RELATED DISEASE TRUST FUND

Scheduled for Hearing
Before the
SUBCOMMITTEE ON HEALTH
of the
COMMITTEE ON FINANCE
On September 9, 1985

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION
September 6, 1985

JCX-14-85

INTRODUCTION

The Subcommittee on Health of the Senate Committee on Finance has scheduled a public hearing, to be held on September 9, 1985, on S. 1265, sponsored by Senators Armstrong, Pell, Inouye, Long, and Boren.[1] This bill, the "Asbestos Workers' Recovery Act," would establish an Asbestos-Related Disease Trust Fund, to be financed primarily by assessments on defendants in asbestos liability cases, their insurers, and the Federal Government, to compensate workers injured by occupational exposure to asbestos.

This document,[2] prepared by the staff of the Joint Committee on Taxation, summarizes present law and the principal provisions of the bill.

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[1] In introducing the bill, Sen. Armstrong stated that it had been "written jointly by many asbestos manufacturing companies," and that he was introducing the bill for discussion purposes. 131 Cong. Rec. S7714 (daily ed. June 7, 1985).

[2] This document may be cited as follows: Joint Committee on Taxation, Description of S. 1265 Relating to Proposed Asbestos-Related Disease Trust Fund (JCX-14-85), September 6, 1985.

DESCRIPTION OF THE BILL

Background

Under present law, claims for damages brought by individuals who were exposed to asbestos during work have generally been pursued through the courts. Damage claims based on the consequences of asbestos exposure generally involve lung diseases, including asbestosis and cancer, which in some cases may take more than 20 years to be manifested, and which may result in disability or death.

It has been estimated that more than 20,000 asbestos liability cases are pending in State and Federal courts and that the parties have incurred about $1 billion in expenses on such cases, much of it for legal fees and costs. One former asbestos producer filed for bankruptcy reorganization in 1982 at a time when 16,500 asbestos-related lawsuits were pending against it, in which more than $12 billion in damages were claimed.[3]

Present Law

Present law does not utilize the tax system to establish a specific mechanism for compensating individuals injured by occupational exposure to asbestos.

In the case of individuals who have been totally disabled by pneumoconiosis (black lung disease), present law finances certain benefits to the coal miners (or their survivors), in cases where no specific coal operator is found responsible for the injury, through an excise tax on coal. Revenues from the coal tax are transferred to the Black Lung Disability Trust Fund, established pursuant to the Black Lung Benefits Revenue Act of 1977. The trust fund pays black lung medical and rehabilitation benefits as well as monthly cash support payments, which vary according to the number of dependents in the miner's family, out of such tax revenues (and repayable advances from the general revenues.[4]

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[3] See, generally, N.Y. Times, Aug. 3, 1985, at 1, col. 6; Wall Street Journal, June 21, 1985, at 6, col. 5; 131 Cong. Rec. S7714 (daily ed. June 7, 1985) (statement of Sen. Armstrong).

[4] The present-law Superfund program targets specific taxes for the payment of remedial and other costs (e.g., cleanup of abandoned hazardous waste sites) when no specific party is individually liable for such costs. The costs financed

(Footnote continued)

Explanation of Provisions

Establishment of trust fund

The bill (S. 1265) would establish a new trust fund in the Treasury, the Asbestos-Related Disease Trust Fund, to compensate individuals suffering disease, disability, or death attributable to occupational exposure to asbestos. Except for workers' compensation claims, payments from this trust fund would constitute the exclusive remedy for pending cases and future claims resulting from occupational asbestos exposure.

Financing of trust fund

The Asbestos-Related Disease Trust Fund would be financed through assessments imposed on suppliers of asbestos or asbestos-containing products which are defendants in asbestos-related disease litigation filed between 1960 and 1982 (plus other suppliers listed by the Secretary of the Treasury as additional defendants), on these defendants' insurers under asbestos insurance policies, and on the United States (i.e., the Federal Government).

One-half of the aggregate assessments would be paid by the United States, based upon its asserted responsibility for asbestos exposure as a result of naval construction activities during World War II, the Korean War, and thereafter. The remaining assessment amount would be allocated among the original asbestos defendants (i.e., the 1960 though 1982 defendants) according to an agreement to be negotiated by the defendants themselves and submitted to the Secretary of the Treasury. These allocations would be adjusted upon the addition of further defendants.

The bill would set aggregate semi-annual assessments of $150 million for each of the first two years. For later years, aggregate assessments would be determined according to a formula intended to maintain the fund at a level necessary to pay claims for which the fund is liable (as described below). Repayable advances to the trust fund from general revenues would be authorized under specified conditions.

The assessment against any individual defendant would be reduced by the amount of prior asbestos-related recoveries against that defendant and by amounts assessed against the defendant's asbestos insurers. Assessments against insurers would be allocated proportionately among multiple insurers,

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[4] (continued)
through such taxes do not include medical benefits to individuals injured by hazardous wastes.

and would be limited to the outstanding value of each policy. Special rules would be provided for defendants in bankruptcy proceedings, including rules for the acceleration of future obligations in specified circumstances.

Treatment of assessments as taxes

The bill specifies that assessments for the Asbestos-Related Disease Trust Fund would be treated as excise taxes for purposes of the Internal Revenue Code. Thus, the Internal Revenue Service presumably would administer the assessment provisions of the bill and collect the assessment amounts pursuant to the general excise tax administrative rules of the Code.

Expenditures from trust fund

Amounts in the trust fund would be made available to pay benefits to individuals in respect of disability or death caused by occupational exposure to asbestos. Benefits would be paid to the affected individuals or their survivors on an interim basis (while a claim remained subject to further review) or in the form of lump-sum payments. The maximum total payment for any individual would be 92 times the average weekly wage for manufacturing workers in the relevant State at the time of the award, as determined by the Secretary of Labor in consultation with the Secretary of Health and Human Services. This amount would be reduced for partial disabilities, or when death or disability resulted only in part from asbestos exposure.

The bill provides that benefits paid from the trust fund would be excludable from income for Federal income tax purposes. Benefits would not reduce (or be reduced by) other workers' compensation, unemployment compensation, disability insurance, or other similar benefit payments; however, benefits would be reduced by prior recoveries in asbestos-related legal actions. Benefits provided by the bill would be payable only out of the trust fund.

The claims procedure would be administered by the Department of Health and Human Services, using procedures similar to those used for reviews of disability claims under the Social Security Act, or by delegated State authorities. Claimants would generally be required to apply first for regular workers' compensation, and factual determinations (e.g., whether a person is disabled, and whether and to what extent disability resulted from asbestos exposure) would be made by workers' compensation programs whenever possible. A National Medical Panel would be established to decide which diseases should be included on a general list of asbestos-related diseases, and to determine whether specific diseases can be caused by asbestos.

Under the bill, claims against the trust fund would constitute an exclusive remedy for occupational exposure to asbestos (except for workers' compensation claims). Thus, asbestos defendants and insurers, other sellers or distributors of asbestos (or products containing asbestos), and their employees, agents, and shareholders, would be immune from liability with respect to all related actions pending on the effective date of the bill or commenced thereafter. The bill provides that no Federal or State court or administrative agency would have jurisdiction over any claim of liability for occupational exposure to asbestos. Claimants in pending cases would have up to two years in which to file claims against the trust fund.

The bill includes a provision under which the entire legislation would be nullified if the bill itself were found unconstitutional or if specified major elements of the bill (such as the mechanisms for allocating assessments among the asbestos defendants, or providing benefits to claimants) were held invalid. However, once full payment of a claim were made, that claimant would be prohibited from seeking any other remedy, even if the entire bill were nullified. The entire legislation also would be nullified if the Trust Fund exhausts its funds.

The bill would establish a new, three-judge district court in the U.S. District Court for the District of Columbia. This new court alone would have jurisdiction to hear cases challenging the constitutionality of the bill or the allocation of assessments among the asbestos defendants. Also, this court would be empowered to stay or enjoin any proceeding in any State or Federal court (other than the U.S. Supreme Court) if that proceeding were to interfere with an order of the new court.

In addition to benefit payments, monies in the trust fund would be available to fund certain research, training, and evaluation projects (not to exceed 0.50 percent of the amount spent on benefits), and for administrative expenses.

Management of trust fund

The Asbestos-Related Disease Trust Fund would be managed by the Secretary of the Treasury or the Secretary's designee (the "managing trustee"), who would report annually to Congress on the condition of the fund. A six-member committee, consisting of the managing trustee and of representatives of asbestos defendants, insurers, claimants, employees, and State workers' compensation programs, would oversee operation of the trust fund.

Effective Date

The bill generally would be effective on the date of enactment.

Statement by U.S. Senator Bill Armstrong (R-Colo.)

Mr. Chairman, I am grateful that hearings are being held on this legislation today. I compliment you and your staff for the work you have done to organize this hearing in such a timely manner. As you know, Mr. Chairman, the purpose of this legislation is to address an extremely serious and controversial problem of how to provide compensation for workers who have been injured by exposure to asbestos. Tragically, this exposure has resulted in crippling and often fatal asbestos related diseases.

It is well known that asbestos claims have been clogging our courts for several years. According to the American Bar Association, more than 20,000 asbestos liability cases are currently pending in state and federal courts. According to the Rand Corporation study, producers and insurers have spent about $1 billion in compensation and legal expenses in the last ten years. Yet for every dollar spent on compensation asbestos victims, on the average, only 37 cents ever gets to the injured worker; 63 cents, nearly two thirds of the amount recovered, goes to the lawyers fees and court costs.

In the past, compensation of victims has been proven to be inadequate due largely to the problems in litigating this type of case. Many of these workers were exposed to high levels of asbestos before the dangers were known and health safety standards for exposure were established. In many asbestos cases, the disease was not discovered until many years later—up to 20 or 30 years. As a result, liability is difficult to trace to the liable party and asbestos manufacturers, producers, and their insurance companies all have been jointly sued in almost every case. The federal government has also been sued in many of these cases due to the use of asbestos in the government supported ship building program during World War II.

Although workman's compensation is available, victims and their attorneys rarely pursue this remedy. Instead they will initiate an action in court becasue court awards are usually higher than those given in workman's compensation. In addition, attorneys prefer court actions because attorneys fees will be higher in court awards than in workman's compensation.

In response to these problems, I have introduced this legislation co-sponsored by senators Pell, Inouye, Boren, and Long. This legislation limits workers injured by occupational exposure to asbestos to recovery in workman's compensation. Claimants must file claims in the appropriate state or federal workers compensation program for injuries resulting from an "asbestos related disease". A National Medical Panel is created to precisely define "asbestos related diseases". A trust fund is established to pay the lump sum benefit to eligible individuals whose claims have been adjudicated successfully in workman's compensation. The trust fund is financed by asbestos companies, their insurers and the federal government. Provision is made in the bill to reassess the financing of the individual trust fund contributors as least every three years so that the obligation to finance benefits is allocated in a manner consistent with the actual asbestos claims.

I am aware of other non-legislative solutions that are being explored to clear up the backlog in cases currently pending in the courts. For example, earlier this year the Wellington Resolution Group composed of asbestos producers, insurance and reinsurance companies testified before Senator Nickles labor subcommittee on a proposal to establish a private Asbestos Claims Facility.

The purpose of the facility is to provide a faster, less costly alternative to asbestos claims litigation in the courts by making available to claimants a facility to negotiate settlements and encourage resolution of asbestos claims. Recently the Wellington resolution group reached an agreement to begin setting up their operation. However, the implementation of this proposal is still very much in the beginning stages.

In addition to the Wellington proposal, the Johns Manville Corporation recently announced their own plan to compensate asbestos victims pending against the company. An agreement was reached by counsel of the future asbestos claimants and Manville Corporation that establishes a trust fund that will assume all liabilities for present and future asbestos victims through a specified financial arrangement. This plan is an alternative to tort litigation and is intented to provide an equitable and efficient means of comepnsating claims.

The plan ensures funds by diverting at least 50%—perhaps as much as 80%—of Manville's stock into a special trust fund into which the company pays hundreds of thousands of dollars in insurance and cash as well as 20% of its annual profits for years to come. More than half a billion dollars will also be set aside to pay unsecured creditors who have not been paid since 1982 when the company faced 16,500 lawsuits filed by victims.

To quote the August 6th Washington Post article, "No plan can provide a happy ending to the sorry story of asbestos exposure, and lawyers for the parties involved will surely haggle over some aspects before agreement is finally reached. But the main features of the plan appear to promise decent and swift compensation for victims, and that is the principal criterion by which the settlement should be judged."

Mr. Chairman, as generous as the Manville plan is it does not solve the entire problem. The plan clarifies the number of dollars Manville will pay to creditors and asbestos victims, but it does not satisfactorily resolve how asbestos creditor claims are to be evaluated and the dollar amount of these claims. In addition, the plan does not provide a delivery system for objective medical evaluation of legitimate asbestos claims.

This legislation sets up a system of compensation through workman's compensation and a plan for expert medical evaluation of claims. It also establishes a dollar amount for claims based on awards made by court actions. Since it removes these asbestos cases from the tort system, substantial savings would be realized by the state and federal judicial systems.

In addition, this legislation forces Congress to address another critical issue concerning the responsibility of the U.S. Government in these asbestos cases. It is a well known fact that the federal government has been sued many times as a result of its usage of asbestos in the shipyards durng World War II. Although the federal government continues to avoid liability by asserting sovereign immunity in defending itself in these cases, evidence suggests that the federal government had knowledge of the dangers of asbestos, yet continued to place shipyard workers at risk.

The Justice Department stated in its first asbestos case with the Manville Company (Claims Court N. 465-83C) that "Between 1898 and 1945, there were over 200 articles published in medical, safety engineering and insurance journals describing the health hazards of asbestos." Therefore the dangers of asbestos were well known by the health community and made available to the government. In addition, memorandum and reports circulated during this period suggest that concerns were raised by the government's own health sources on the dangerous levels of asbestos exposure in the shipyards.

Mr. Chairman, many questions on government responsibility in these cases remain unanswered. However this legislation offers a beginning point for discussions on this issue and other issues concerning the compensation of asbestos victims. I introduced this legislation with the specific intent of encouraging a solution—not just a legislative solution—to the backlog of court cases involving the compensation of asbestos victims. The real tragedy here is not so much the inconvenience of clogged courts—the real tragedy is that thousands of asbestos victims remain uncompensated while legal fees and overhead expenses continue to accumulate. Therefore, it is imperative that any solution to this problem—legislative or judicial—requires that we look first to the objective of farily and adequately compensating these victims and their families in the most expeditous and efficient manner. I am hopeful that hearings such as this will help encourage such a solution.

Senator **Durenberger**. The hearing will come to order.

This morning, the Subcommittee on Health is holding a hearing on S. 1265, the Asbestos Workers' Recovery Act introduced by our colleague from Colorado, Senator Armstrong, and cosponsored by several others. I understand Senator Armstrong is delayed in traffic and will be here shortly.

This act would establish a mechanism by which victims of asbestos-related diseases would be compensated and would prohibit recovery by such victims through traditional means of litigation.

We have several witnesses who have agreed to testify here today, and we have a number of witnesses we would like to have had testify, including the U.S. Government, who have refused to testify. I don't know if there is any significance to all of that, but I am pleased that those witnesses who are here today and who have agreed to testify have done so; presented their statements in advance, all of which will be made a part of the record of this hearing.

By way of advance agreement and tradition, at least of late, of this committee, the oral testimony will be limited to 5 minutes each, and the record will be held open for some, as yet, undetermined period of time after the hearing for additional comments by any of the witnesses or by anyone else who deems their testimony appropriate to the issue involved.

The first witness would be Mr. Frederick Ross, president and chief executive officer, Raymark Corp. Mr. Ross, while you are coming up here, I'll ask my colleague, Bill Armstrong, if he has an opening statement now or would you defer, Bill?

And why don't you come on up here, unless the light is better down there.

Senator **ARMSTRONG**. Mr. Chairman, I do have a lengthy and I trust interesting statement which you will be relieved to know that I intend to submit for the record for anyone who might be disposed to want to read that.

Senator **DURENBERGER**. Is there any objection to submitting the interesting but lengthy statement for the record? [Laughter.]

Senator **ARMSTRONG**. The only thing I would add to that, Mr. Chairman, is a word of appreciation to you for scheduling this hearing. The issue which is to be heard today is, as I have pointed out to you privately on a number of occasions, of extraordinary importance, and I commend you for taking the lead in trying to work out a solution to it.

Senator **DURENBERGER**. Thank you.

Mr. Ross, we welcome you and your testimony at this hearing.

STATEMENT OF FREDERICK ROSS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RAYMARK CORP.

Mr. ROSS. Thank you, Mr. Chairman, members of the subcommittee. My name is Frederick J. Ross. I'm president and chief executive officer of Raymark Corp. in Trumbull, CT. Raymark employs 1,900 workers in the manufacture of friction materials for brakes, transmission systems, and a variety of industrial uses.

I want to thank you, Chairman Durenberger, and this subcommittee for extending me this opportunity to testify. I'm testifying concerning the need for a fair and comprehensive solution to the asbestos compensation crisis facing our Nation.

I'm heartened by the fact that S. 1265, the Asbestos Workers' Recovery Act, already has 5 Senate sponsors and 65 sponsors in the House. Raymark and companies like it, along with the injured American asbestos workers, look now to you and to other Members of Congress for a solution to this national health tragedy.

The statistics indicating the inadequacies of the current tort system are so obvious that they border on cliche: Of the more than 30,000 lawsuits to date filed against Raymark and other companies, over 25,000 cases are still pending. One study predicts that there will be over 52,000 claims by the turn of the century.

An average of about 550 new plaintiffs seek damages from Raymark every month. These total approximately $1½ billion. Each day, Raymark receives, on average, claims totaling twice my company's net worth. In the face of such claims, we have no choice but to defend ourselves and to do so very vigorously.

The Rand Corp. has estimated that of every dollar spent on asbestos claims by manufacturers and insurers, injured workers received only 37 cents. Thus, of over $1 billion in money that has been spent on asbestos cases so far, only $630 million have gone to attorneys and others who thrive on the present litigation and not to the injured victims at all.

This, I submit, is a travesty of justice.

Ultimately, the breakdown of the tort system hurts victims of asbestos disease the most. These suffering people with real and immediate needs must wait up to 5 years for a decision. Ultimately, Mr. Chairman, those most at risk are the workers who have yet to manifest disease. If the assets of all of our companies continue to erode, the future claimants with claims fully as worthy and needs just as compelling as the present claims may find businesses unable to provide adequate compensation.

Now what are the options open to us? Some have argued that we should do nothing. But fewer and fewer voices are advocating the status quo. The existing system serves only the lawyers; not our society as a whole.

A second option is to reform the substantive tort law. Such reform, while certainly warranted, would not address the unique and urgent problems posed by asbestos litigation.

The third option is to establish a privately negotiated settlement to resolve some of the controversy. Here, there is some progress. The Wellington Group, currently numbering 54 asbestos producers and 16 insurance companies, seeks to establish an improved process for reviewing and settling claims.

I do not know if the Wellington Group will be successful in resolving a significant number of disputes. But even if it is a great success, it cannot resolve certain critical issues.

Most importantly, the U.S. Government is not a participant. Therefore, no provision has been made for the Government sharing the cost for its very major role in the asbestos health tragedy. There is no uniform schedule of benefits under Wellington. Claimants with equally meritorious claims may receive quite different awards. There is no exclusivity. Claimants can still go to court before or after negotiating with the asbestos claims facility. The problems of asbestos claims inundating the courts, therefore, may well not be alleviated.

The fourth option, and the one that I support, is to pass Federal legislation establishing an administrative compensation system to replace the existing tort litigation. Such legislation should be built on the following key criteria:

Claimants must be provided fair, prompt, adequate, administrative remedy as the exclusive settlement for tort litigation. All parties, including business, their insurers, and especially the Federal Government, must contribute to the funding program. A private settlement without the Federal Government cannot be a comprehensive solution.

Now why should the Federal Government participate? Over 70 percent of the asbestos-related claims against my companies have arisen from exposure to the wartime shipbuilding effort. The United States played the leading role in the use and excessive exposure to asbestos in wartime shipbuilding. Its responsibility for the current tragedy is very obvious. According to Government documents, declassified in recent years, the United States was more concerned with wartime ship production than with the tight enforcement of asbestos safety standards, even though the Government knew fully of the risks of asbestos exposure in the workplace.

This may well have been appropriate under wartime conditions, but it is certainly not appropriate for industry to be left to bear the entire cost.

Significantly, Mr. Chairman, the American people agree that the Government should share in the responsibility for the asbestos tragedy. Nearly 80 percent of those surveyed recently stated that the Government should share the responsibility for compensating workers with asbestos-related injuries resulting from the wartime shipbuilding efforts.

In the not so long term, an administrative compensation system will actually save the Government money. The Government is already spending millions of dollars to pay for asbestos litigation, including costs to lawyers, courts and possible settlements and judgments. Participating in an administrative compensation system would save large amounts for the Government.

Since I last testified, Mr. Chairman, emerging legal trends, most recently illustrated by last month's decision in a Federal court in San Francisco in a case brought by Manville Corp., indicate that the Government is in danger of being found liable for a substantial part of the asbestos tort cost.

Mr. Chairman, the Government is being short-sighted, penny-wise and pound-foolish in refusing to contribute along with its industrial partners in the funding of an administrative compensatio program.

Senator Durenberger. Are you near the end of your statement?

Mr. Ross. Yes.

Senator Durenberger. How near?

Mr. Ross. One minute.

Claims must be decided without excessive administrative costs or new bureaucracy. Finally, there must be a minimum interference in State workers' compensation programs.

Chairman Durenberger, I believe that the Asbestos Workers' Recovery Act best meets these criteria. It is a major step in the right direction. The existing litigation clogs our already burdened courts, stifles business operations, and imposes unfair burdens on injured workers. It helps only lawyers.

Mr. Chairman, our company stands ready to work with you and your subcommittee and your colleagues in the Senate to find a truly equitable legislative solution.

I thank you very much.

Senator Durenberger. Thank you very much.

[The prepared written statement of Mr. Ross follows:]

STATEMENT OF FREDERICK J. ROSS
SENATE HEALTH SUBCOMMITTEE
SEPTEMBER 9, 1985

Mr. Chairman and Members of the Subcommittee:

My name is Frederick J. Ross. I am President and Chief Executive Officer of Raymark Corporation of Trumbull, Connecticut. Raymark is a medium-sized company of 1,900 employees, which manufactures friction materials for brakes, transmission systems, and a variety of industrial uses.

INTRODUCTION

I want to thank you, Chairman Durenberger, and this Subcommittee for extending me this opportunity to testify concerning S. 1265, the "Asbestos Workers' Recovery Act" -- which I believe is the best legislative vehicle so far for achieving a fair and comprehensive solution to the asbestos compensation crisis facing our nation.

Raymark, like other past and present manufacturers of products that contain asbestos, confronts an enormous problem whose genesis is historical but whose impact is current and immediate. In recent years, Raymark's research efforts have enabled it to reduce its reliance on asbestos.[1] Nevertheless, products manufactured over a generation ago, in different plants, by different workers, under different managers -- and used over a generation ago at facilities over which our company had no control -- have come back to haunt us, in the form of thousands of disease claims that are inundating the courts and clouding our economic future.

The number and complexity of these claims and the huge economic, social, and legal problems they have spawned represent a national tragedy. Existing mechanisms are simply incapable of providing prompt and equitable compensation for asbestos-related diseases. Moreover, the compensation they do provide comes at a price in transaction costs that no one can afford to bear: not the manufacturers or their insurers, not the public, and certainly not the disease victims.

This is the fourth time in the past two years that I have testified before Congress concerning this crisis.[2] Chairman

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[1] Raymark manufactures and markets friction materials for brake and transmission systems utilized in cars, trucks, buses, tractors, and construction equipment. Although there are some applications where no substitutes have yet been found, Raymark has successfully developed numerous asbestos-free products. The asbestos-containing products we manufacture today employ encapsulated asbestos fibers that are generally believed to pose little or no health risk.

[2] Hearing on H.R. 1626 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 99th Cong., 1st Sess. (April 23, 1985); Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd

(Footnote continued)

Durenberger, I am a businessman, not a professional witness, but this issue is so important that I stand ready to tesify any place and at any time to help further a solution to this devastating problem.

I am also heartened by the fact that S. 1265 already has five Senate sponsors and sixty-five sponsors in the House. Companies like Raymark -- and the injured American asbestos workers -- turn now to you and to other members of Congress for a solution to this national health tragedy.

(Footnote 2 continued from previous page)
Sess. (April 30, 1984); Hearing on H.R. 3175 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (June 13, 1983).

See also Statement on behalf of the Committee for Equitable Compensation presented by John L. Baldwin at Hearing Before the House Labor Standards Subcomm., 98th Cong., 1st Sess. (Feb. 10, 1983); Statement on behalf of Raymark Corporation presented by Kenneth R. Feinberg at Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. (Nov. 10, 1982); Statement of the Asbestos Compensation Coalition ("ACC") submitted to the House Labor Standards Subcomm., 97th Cong., 2nd Sess. (Sept. 9, 1982); Letter on behalf of the ACC submitted by William C. McLaughlin to Hon. George Miller on May 4, 1982; Statements on behalf of the ACC presented by William C. McLaughlin, G. Earl Parker, John L. Baldwin, and Victor L. Drexel at Hearing Before the House Labor Standards Subcomm., 97th Cong., 2nd Sess. (April 21, 1982).

I. THE NATURE OF THE PROBLEM

Asbestos litigation is a grossly inadequate means of providing compensation for injured workers. The Rand Corporation has estimated that, of every dollar spent on asbestos claims by manufacturers and insurers, injured workers receive only 37 cents.[3] Thus, of the over $1 billion in compensation and litigation expenses that has been spent on asbestos claims, fully 630 million dollars have gone to attorneys and others who thrive from the present litigation, not to the victims at all. This, I submit, is a travesty of justice.

The costs and difficulties imposed by asbestos litigation upon an already overburdened civil justice system -- and upon the claimants who must depend on it, and upon our companies that must pay for it -- continue to mount:

- Of the more than 30,000 lawsuits to date filed against former and present manufacturers or installers of asbestos-containing products and their insurance companies, over 25,000 cases are still pending.[4] Because of the long latency period for asbestos diseases, we anticipate a steady stream of new claims for years to come. One study has estimated that the total will probably exceed 52,000 claims by the early years of the next century.[5]

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[3] Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses, at xix (The Rand Corporation, 1984).

[4] Almost all of the suits were instituted not by our own employees, but by the employees of other companies, on various theories of product liability. This staggering number of lawsuits does not include workers' compensation claims filed against the various manufacturers.

- An average of about 550 new plaintiffs seek damages from Raymark each month, totalling approximately one and a half billion dollars. Each day, Raymark receives, on the average, claims totalling more than twice my company's net worth. *In the face of such claims, we have no choice but to defend ourselves vigorously.*
- The magnitude of the problem is illustrated by a massive trial which began in San Francisco last spring, between five manufacturers and more than 50 insurance companies, who are fighting over claims worth 5 *billion* dollars. A $200,000 renovation had to be done on a special auditorium merely to accommodate the more than 100 lawyers participating in

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[5] Prior to its filing under Chapter 11 of the U.S. Bankruptcy Code, the Manville Corporation commissioned an epidemiological study which projected a total of more than 52,000 lawsuits by the year 2010. *See* *The Manville Bankruptcy and the Northern Pipeline Decision*, Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 24 (Nov. 10, 1982); *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims*, Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess. 53-56 (Sept. 10, 1982).

the case[6] -- all of whom are being paid with dollars that could be better spent by compensating the victims.

- My company, Raymark, alone has incurred over $30 million in asbestos litigation-related costs in the period since 1980.

A. Unfairness to Present Claimants

Ultimately, it is the victims of asbestos disease who are the hardest hit by this breakdown of the tort system. The normal legal procedures for handling these claims is so inefficient that victims with a real and immediate need are forced to wait years for a decision. Our experience at Raymark has been that it takes up to five years to resolve many asbestos claims in the courts.

Moreover, jury awards are often unpredictable and inequitable, rewarding one claimant handsomely, while providing equally meritorious claimants little or nothing. Legal technicalities prevent recovery by many others.

A poignant example well illustrates this inequity. Richard J. Hogard and Robert L. Hance were insulation workers in the same shipyard at Long Beach, California, in the 1960s. Hogard claimed to have been disabled by asbestosis, sued for compensation in California, and was awarded one million dollars by the jury. Hance also claimed to have been disabled by asbestosis, sued in Wyoming, and was awarded nothing.

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[6] See The New York Times, March 5, 1985 at Section D, page 8, col. 3; Mealey's Litigation Reports, February 26, 1985, at 1902.

The Chapter 11 filings of the Manville Corporation, UNR Industries, Inc., and Amatex Corp. have confronted present disease claimants with the prospect of even greater delays and more uncertainty. Just how and when these claims against the Chapter 11 companies will ever be resolved -- and for how many cents on the dollar -- is anybody's guess.

B. The Enormous Drain on Resources

The enormous costs associated with this litigation have resulted in a massive and relentless drain on the resources of the companies affected. In 1984, Raymark and its insurers spent over $10 million just in legal defense fees in connection with the litigation of asbestos disease claims. Of the 78 cases tried to verdict since January 1, 1982, Raymark won 42. These courtroom victories were in some sense Pyrrhic, however, because the combined cost to Raymark and its insurers for litigating these cases was over $2 million! Based on these figures, if Raymark and its insurers were to go to trial on each of the 19,338 pending cases (involving 23,910 plaintiffs) in which we have been named as a defendant, our combined costs would amount to $1 billion -- even if we won every single case! It is true that efforts to streamline litigation have recently resulted in some savings per case in defense costs, but since the number of filings continues to multiply, aggregate costs have continued to rise.

Compounding these problems, some insurance carriers have refused to meet their contractual obligations to pay asbestos claims until ordered by a court to do so. As a result, many manufacturing companies that paid millions of dollars in insurance premiums over the years cannot obtain the benefits of their insurance policies until after the completion of protracted and very expensive litigation.[7]

Scores of cases are currently being litigated around the country on the question of which insurance policies should cover losses resulting from asbestos-related disease. The massive San Francisco litigation already mentioned -- in which over 100 attorneys are involved in a $5 billion lawsuit between 5 manufacturers and more than 50 insurance companies -- is but one example.

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[7] In November 1983, February 1984, July 1984, and October 1984, the Cook County, Illinois, Circuit Court issued orders that require certain of our insurance carriers to assume the liability and defense costs of pending and future asbestos-related litigation. Zurich Ins. Co. v. Raymark Indus., Inc., No. 78 L 8760, [Nov. 25, 1983 issue] Asbestos Lit. Rptr. (Andrews Publications) at 7470 (Cook Co., Ill. Nov. 18, 1983).

Possibly the worst aspect of the ongoing insurance disputes is their promise to continue. Despite the standardized language used in nearly all of the liability insurance policies issued during the relevant time periods, various courts have applied the same language in different ways. It is doubtful whether full uniformity of interpretation can ever be achieved in the courts.

The time, effort, and dollars spent in such complex and protracted litigation could more usefully be put to other, more worthwhile purposes -- including the development of asbestos-free products and compensation of disease victims. Quite simply, executives like me find ourselves in the business of conducting asbestos litigation, rather than in the business of running our companies.

C. Financial Uncertainty for Business Operations

Furthermore, the enormous uncertainties and delays under the existing tort system prevent us from being able to accurately plan our financial future. This uncertainty derives not only from our inability to predict the outcome of tens of thousands of lawsuits or the number of claims that will be filed in the years to come, but also from the ongoing insurance disputes that I just described.

Indeed, in Raymark's case, independent accountants give only qualified approval to our balance sheets. These developments have made it extremely difficult for Raymark to raise capital from the debt or equity markets.

Mr. Chairman, Raymark is determined to avoid the shelter of the bankruptcy court. However, because of the Chapter 11 filings by Manville, UNR, and Amatex, our existing commercial creditors demanded and received security for their loans. These security provisions limit the assets available to benefit future disease claimants, and appreciably increase the company's cost of borrowing.

D. The Threat to Future Victims

Ultimately, Mr. Chairman, those most at risk are the workers whose diseases do not develop until future years. As I have already emphasized, the massive litigation diverts both financial resources and attention from business operations whose continuity is essential for the payment of these claims. Certainly in Raymark's case, the multiplication of financial uncertainties has meant that an increasing proportion of our company's assets are pledged to our commercial creditors and would be unavailable to pay future disease claims.

If the present situation continues, and if the assets of all of our companies continue to erode, I leave it to your wisdom, Chairman Durenberger, to anticipate who may eventually be left to pick up the tab for these future claimants.

II. THE NEED FOR A LEGISLATIVE SOLUTION

Perpetuation of the status quo, with its steady depletion of these necessary resources, cannot be tolerated. But what does the corporate officer, who inherited this crisis, do to meet his obligations, not only to asbestos victims and their families, but to the corporation's shareholders and employees?

A. Options

What are the options available to us? As I see it, we could either do nothing, seek to develop non-legislative mechanisms, enact federal product liability legislation, or establish an administrative compensation program for asbestos.

1. Do Nothing. Some have argued that we should do nothing. But those who advocate this position are not those who are confronted by the problem. The status quo -- with its steady depletion of corporate resources needed to pay claimants, while paying millions of dollars in legal fees -- would simply perpetuate a system that serves only the lawyers and not our society as a whole.

2. Non-legislative Mechanisms. A second option is to establish privately negotiated non-legislative mechanisms, to attempt to resolve at least some of the controversy through settlement. Here, there is some progress. I am sure you are aware of the "Wellington Group" -- currently numbering 34 asbestos producers and 16 insurance companies seeking to establish an improved process for reviewing and settling asbestos claims. Such an approach, if successful, could reduce the enormous cost and delay of the present litigation.

It is not yet known if the Wellington asbestos claims facility will be successful in resolving a significant number of disputes. Even if it has great success, the Wellington agreement does not and cannot resolve certain critical issues:

- The United States is not a participant, therefore no provision is made for the government sharing the cost for its major role in the asbestos health tragedy.
- There is no uniform schedule of benefits, thus claimants with equally meritorious claims may receive different awards, based in part on purely speculative damages, like pain and suffering.
- There is no exclusivity, claimants can still go to court before or after negotiating with the asbestos claims facility, thus the problem of

asbestos claims inundating the courts may not be alleviated.

There is no question in my mind that federal legislation is the only way to provide a comprehensive solution to all aspects of the asbestos compensation crisis.

3. Federal Product Liability Legislation. A third option is to reform the substantive tort law. But such a reform, while warranted, would not have a significant effect, overall, on the asbestos litigation.

It is important to understand what product liability reform can -- and cannot -- do regarding asbestos. For example, Senator Kasten's product liability bill, which was reported favorably last year by the Senate Commerce Committee, and has been reintroduced as S. 100, would have the following principal effects on the asbestos litigation:

- Increased uniformity and predictability in the product liability system.

- The statute of limitations and statute of repose would allow additional asbestos claims to be filed in several states.[8]

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[8] S. 100 would establish a "discovery rule" form of statute of limitations, preserving the right of some asbestos victims to sue in several states where their claims would be barred
(Footnote continued)

- A rule imposing liability on the basis of what manufacturers should reasonably have known about asbestos risks, which is similar to the rule already in effect in almost all jurisdictions, and which would affect the outcome of few asbestos cases.[9]

(Footnote 8 continued from previous page) today. Under section 14 of S. 100, a civil action will not be barred if it is --

> filed within 2 years of the time the claimant discovered or, in the exercise of reasonable prudence, should have discovered the harm and its cause . . . .

By way of contrast, the New York statute begins to run as soon as a person is exposed, see Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), appeal dismissed, 456 U.S. 967 (1982); and the Virginia statute begins to run at the time the disease first developed, see Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981). Because asbestos-related diseases develop over a period of many years, such rules cut off many claims before the victim either knows or has reason to know of the harm and its cause.

The statute of repose in section 11 of S. 100, which ordinarily terminates the right to bring suit 25 years after date of delivery of capital goods, does not apply to latent injury such as caused by asbestos. This is a more victim-oriented rule than that which applies now in some states.

[9] Most asbestos claims are based on the manufacturers' failure to warn. In almost all jurisdictions, there is in one way or another a requirement of proof that the defendant knew or had reason to know about the risk of asbestos harm before liability can be imposed. S. 100 would retain such a requirement. New Jersey has imposed "absolute liability" on the manufacturers of asbestos, even though they neither knew nor had any reason to know about asbestos risk. See Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982). Accord, Halphen v. Johns-Manville Sales Corp., 737 F.2d 462, 465 (5th Cir. 1984) (applying Louisiana law). S.

(Footnote continued)

Thus, S. 100 would actually increase the number of asbestos tort claims that would be filed. By establishing uniform rules for all jurisdictions, the bill might facilitate some settlements and reduce some litigation costs for asbestos claims. However, it would not address the fundamental problems of the asbestos litigation.

For ordinary product-liability cases -- involving, for example, an individual defective machine, an immediate and identifiable injury, and clearly identifiable parties and manufacturers -- establishing simplified and uniform rules, as S. 100 is designed to do, should make settlement or litigation significantly quicker and more efficient. However, an asbestos-related case presents complications that product liability reform simply cannot address.[10] And even beyond the question of expense

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(Footnote 9 continued from previous page)
100 would serve to replace this rule of "absolute liability." However, the New Jersey rule has not been adopted by the vast majority of states, and replacing the rule of absolute liability would affect the outcome of few asbestos cases.

[10] Generally, asbestos health claims --

- are not brought until 20-40 years after exposure to asbestos fibers;
- in many cases, involve insulation workers who were employed by several companies over a period of years;
- involve employers who purchased asbestos from several suppliers over a period of years, thus

(Footnote continued)

and delay in resolving each individual claim, S. 100 could do nothing about the enormous burden on our courts and our companies posed by the sheer number of existing claims and by the insurance litigation.

Thus, though S. 100 or other bills introduced or discussed this year to reform substantive tort law may be appropriate legislative responses for ordinary product liability cases, these bills would not significantly address the breakdown in the civil justice system regarding asbestos, which is truly unique and unprecedented. No other product has come close to generating the massive amount and complexity of litigation that we face regarding asbestos. In fact, the American Bar Association -- the most prominent representative of our nation's lawyers -- has called this problem a "catastrophic phenomenon on

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(Footnote 10 continued from previous page)
creating uncertainty as to which suppliers are responsible for a claimant's harm;

o involve suppliers each of whom purchased insurance from several insurers during the years they mined, imported, or manufactured asbestos or asbestos-containing products, thus creating uncertainty as to which insurer is liable for a claimant's harm.

Typically, an average of sixteen corporations are named as defendants in each asbestos suit; each of these corporations has ordinarily been insured by several insurance carriers; and the key events occurred decades in the past. Thus, even if damages and causation are clearly established, determining the responsible defendants and their share of the damages is very difficult and costly. S. 100 could not significantly reduce these problems.

a national scale to asbestos workers and the asbestos industry," and the ABA now favors "appropriate federal legislation to establish methods to provide adequate compensation" to those suffering from asbestos-related diseases.[11]

This view is being expressed even by members of the judiciary, who must daily confront the tidal wave of asbestos litigation. In a recent case decision regarding asbestos by the United States Court of Appeals for the Fifth Circuit, in a case involving my company Raymark, the court determined that "a desperate need exists for federal legislation in the field of asbestos litigation."[12] All 13 circuit judges who heard the case agreed that federal legislation for asbestos is called for.[13]

Thus, even if one of the proposed bills to reform substantive tort law were enacted, the crush of the vast number of existing claims, including the tremendous legal and other costs in resolving them, could still result in the worst of all worlds -- desperate courts, insolvent product sellers, and uncompensated claimants.

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[11] Recommendations to the House of Delegates by the ABA Special Committee to Study Product Liability ¶ II (1983), approved by voice vote at the ABA Mid-Year Meeting in New Orleans (February 1983).

[12] Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1327 (5th Cir. 1985).

[13] Id. (en banc majority opinion of 7 circuit judges); 750 F.2d at 1329 (opinion of one circuit judge, concurring in the majority opinion); 750 F.2d at 1332 (opinion of 5 circuit judges, dissenting from the holding of the majority, but "agree[ing] that legislation would be the preferred solution to the dilemma of providing an adequate scheme for the proper distribution of [asbestos] compensation"). One circuit judge did not participate in the case.

4. Administrative Compensation System for Asbestos. The fourth option is to provide an administrative compensation system to replace the existing litigation. Such an option is needed now for asbestos, and this is the option that I support.

B. Necessary Elements of a Legislative Solution

Raymark has worked closely for many years with other current or former manufacturers of products that contain asbestos, in a concerted effort to further and support congressional efforts to develop an equitable system of compensating victims of diseases caused by exposure to asbestos. We have certified the following ten fundamental criteria for evaluating any proposed legislative solution:

First, the program must pay an adequate benefit.

Second, claims must be processed and paid promptly.

Third, claims must be determined on a no-fault basis if the enormous litigation costs and delays are to be avoided.

Fourth, the program must totally eliminate tort litigation and provide an exclusive remedy.

Fifth, all responsible parties -- including businesses, their insurers, and the federal government -- must contribute to the program's funding.

Sixth, the program must be affordable, and parties' obligations must permit sound financial planning and funding.

Seventh, claims must be decided on the basis of the best medical evidence and expertise.

Eighth, administrative costs must be strictly limited.

Ninth, new bureaucracies must be avoided.

Tenth, the program must operate with minimum interference in state workers' compensation programs.

Chairman Durenberger, of all the bills that have been previously introduced in both houses of Congress, I believe that the proposed "Asbestos Workers' Recovery Act" best meets these criteria. It is a major step in the right direction.

III. ISSUES DESERVING PARTICULAR ATTENTION BY THIS SUBCOMMITTEE

I would like to describe four issues that I believe are fundamental to any legislative solution, and to explain how the "Asbestos Workers' Recovery Act" establishes a framework for effectively resolving each of these issues.

A. Federal Government Responsibility

1. Overview

The most important issue involves who will fund this program. We of industry certainly intend to contribute our fair share, but we expect other responsible parties to meet their responsibilities as well. In particular, the federal government has a major obligation because of its important historical role, as a partner with industry, in undertaking the wartime use of asbestos that resulted in the asbestos disease tragedy.

At my company Raymark, over seventy percent of our asbestos-related claims have arisen from exposure in the wartime shipbuilding effort. Looking at the industry overall, of the more than 30,000 asbestos-related claims that have clogged our court system, more than fifty percent have derived from wartime shipyard exposures. The "Asbestos Workers' Recovery Act," relying on this industry-wide average, would have the United

States contribute fifty percent of the costs of compensation -- which I believe is an appropriate proposal.

The United States served as a more than equal partner with private industry in the government's shipbuilding program during World War II and the Korean conflict. Those same partners -- industry and government -- should now form a peacetime partnership to share the financial burden of the tragic asbestos legacy of the wartime shipbuilding effort.

The extent of the wartime partnership between industry and government cannot be overstated. In 1942, the U.S. War Production Board reported, "Every worker and every factory, every bit of material and every machine is now part of the war program. No use of materials is unimportant and no company has the right to think of its own operations except in connection with the war program."[14] The partnership in wartime shipbuilding is further described:

> The combination of government regulation and private enterprise through which American industry operated during World War II was a strikingly decentralized kind of administered economy. In shipbuilding all major problems of production -- management, labor supply, capital, and materials -- were tackled directly by both private corporations and government agencies. Both acted to draw managerial talent from other fields of activity. Both placed orders for materials and components. Both campaigned to add a million to the labor force in the shipyards, and by joint action they created the

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[14] U.S. Production Board, Priorities and Industry (Aug. 1942).

> conditions that made the workers want to come. The distribution of materials, the financing of operations, and the application of efficient engineering became problems both for corporation managers and government officials. Consequently the history of shipbuilding in World War II is at once a history of private enterprise and of government activity.[15]

The government played the leading role in the use of -- and excessive exposure to -- asbestos in wartime shipbuilding. Let me illustrate this with a few stark facts:

- In ships constructed or refurbished during the war years, the government required use of enormous quantities of asbestos which was specified by name.
- The government itself virtually nationalized the asbestos industry -- by stockpiling, importing, selling, and allocating raw asbestos fiber and other asbestos products to private suppliers and construction companies. The government in every respect was a full-fledged supplier of asbestos.
- The United States directly employed over 1 million shipyard workers; and, at both government and

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[15] Lane, F.C., Ships for Victory -- A History of Shipbuilding Under the U.S. Maritime Commission in World War II 1 (1951) [hereinafter cited as "Ships for Victory"].

private yards, the government assumed control of workers' health and safety.

- According to government documents declassified in the last few years, the United States was more concerned with wartime ship production than with tight enforcement of asbestos safety standards -- even though the government knew of the risks of asbestos exposure in the workplace. This may well have been appropriate under wartime conditions, but it is certainly not appropriate for industry to be left to bear the entire cost.

Mr. Chairman, I am proud of the part my company played in the defeat of the Axis powers over a generation ago. During World War II, the Army and Navy issued "E" awards to the top 5 percent of the nation's war production plants. My company's facilities received a dozen of these special awards, in recognition of excellent service in producing materials needed to win the war. To qualify for these prestigious "E" awards, our plants had to meet strict health and safety criteria in addition to achieving an outstanding production record.

The government used our products to protect the lives of those who went off to battle, by installing the most effective known insulation and fire-proofing materials in the ships of the

Navy and merchant marine. But now, over 40 years later, the legacy of our partnership with the government is a health tragedy affecting those patriotic American workers who stayed behind to build the ships.

In such a situation, it is incumbent on Congress to instruct the government to contribute its fair share to help compensate the injured workers.

2. Federal Involvement in Wartime Use of Asbestos.

I would like to describe in greater detail the government's central role in the wartime use of asbestos, especially in the shipbuilding program. (For an even more extensive discussion of the government's role in the wartime shipbuilding effort, I refer you to my testimony two years ago before the House Labor Standards Subcommittee and my testimony last year before the Senate Labor Subcommittee.[16])

(a) Size of the shipbuilding program. The dramatic surge in asbestos consumption in this country in the 1940s can be traced directly to the federal government's breakneck, no-holds-barred program to expand America's one-ocean navy into a war-ready seven-seas navy.[17] From 1940 to 1945, private shipyards as well as government-owned facilities, operating with round-the-clock urgency, built over 7,000 new naval and merchant vessels, more than in the whole previous history of United States shipbuilding.[18] During this same period, over 67,000 ships were converted or repaired.

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[16] *See supra* note 2.

[17] An average of 465,000 short tons, more than double the average annual tonnage used in the 1930s, were consumed in each year from 1940 through 1949. Figures calculated from United States Department of Interior, *Bureau of Mines Minerals Yearbook, 1972: Asbestos* at 4, Table 3 (1973).

Some 4.5 million workers were employed in this crash shipbuilding effort,[19] with nearly 25 percent of this work force employed directly by the federal government.[20] It is thought that nearly 40 percent of the 27.5 million workers estimated to have been exposed to asbestos since 1940 -- 11.2 million workers -- were exposed in the 1940s during the peak of this wartime shipbuilding effort.[21]

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[18] *See* Smith, H.G. and L.C. Brown, "Shipyard Statistics" in 1 *The Shipbuilding Business in the United States of America* 122-123, Tables 45, 46 (F.G. Fassett, Jr., Ed.) 1948 [hereinafter cited as "Shipyard Statistics"]; Fischer, G.J., *A Statistical Summary of Shipbuilding Under the U.S. Maritime Commission During World War II*, Historical Reports of War Administration, U.S. Maritime Commission, No. 2, Table B-1 (1949).

[19] *See* Selikoff, I.J., *Disability Compensation for Asbestos Associated Disease in the United States*, Report to the U.S. Department of Labor, Contract No. J-9-M-8-0165, at 120, Table 2-12 (June 1981). *See also* Hogan, M.D. and D.G. Hoel, "Estimated Cancer Risk Associated with Occupational Asbestos Exposure," in 1 *Risk Analysis* 68 (1981) (estimated 4.3 to 5.4 million shipyard employees).

[20] This estimate is based on both government and private sources, "Shipyard Statistics," *supra* note 18, at 189; U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings, United States, 1909-71* 276.

[21] Selikoff, *supra* note 19, at 120, Table 2-12.

(b) Government-mandated use of asbestos. Every ship constructed or refurbished during the war years made extensive use of asbestos products. Because its fire resistant and tensile strength qualities were not present in any other materials, asbestos was the only choice for many uses in the shipbuilding effort, including floor tiling for ship decks, electric cabling, insulation, and piping system gaskets and packing. For example, my company Raymark (then known as Raybestos-Manhattan, Inc.) produced a series of asbestos-containing products as part of this war effort, including heat-resistant cloth, tape and thread, and asbestos blankets for engine room safety.

For each shipboard asbestos product -- including Raymark's and those of other manufacturers -- the government had an elaborate set of specifications. In the vast majority of cases, the government required asbestos by name, at times actually changing specifications to require asbestos-containing products, regarding the alternatives as unsatisfactory.[22] Thus, manufacturers had to use asbestos to meet government standards. Though asbestos manufacturers assisted in supplying asbestos products, the federal government mandated not only that asbestos be used in shipboard products, but the specific amount and type of asbestos to be used as well.

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[22] See letter from Commandant, Navy Yard, Boston, to Bureau of Ships, 559 (MEFX 1/28) (January 20, 1943); letter to Commandants of all Navy Yards, Supervisors of Shipbuilding and Industrial Managers, from Chief of the Bureau of Ships, S 39-1 (3648) (October 15, 1942).

(c) Government responsibility for the work force and awareness of health risks. As mentioned above, roughly 25 percent of the total work force in all of the country's shipyards during the war years -- approximately 1.1 million military and civilian shipyard workers -- were employed directly by the United States.[23]

Equally important, however, although the ownership status of the private shipyards did not change, the government assumed virtually full control over the millions of private shipyard workers who labored under close and immediate federal supervision made necessary by wartime conditions. Like the soldiers in battle, those who labored in the war production factories and shipyards took their orders from the government. In many cases, shipyard workers were given special exemptions from military service because their skills were deemed more valuable in serving their country at home than on the warfront. In effect, the federal government employed these workers who labored in private shipyards just as it employed the sailors and seamen who crewed the ships after they were launched.

Federal government supervision of the labor force in the shipbuilding effort was pervasive. It included such traditional management functions as determination of how many workers to hire, participation in collective bargaining negotiations and daily supervision of every aspect of the shipbuilding process.[24] Such close and continuous supervision extended beyond the shipyards to the plants of companies -- like Raymark -- that supplied the asbestos products demanded by the government.

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[23] See supra note 20.

This pervasive government supervision of the shipbuilding effort encompassed responsibility for safety inspections and compliance with basic government standards for worker health and safety that applied to these contruction projects. The government, however, abdicated this responsibility by continuing to expose shipyard workers to undue health risks, even though the government was in a unique position to know of the potential health hazards of asbestos exposure to shipyard workers.

A review of government documents, many of which were classified and not available to the public until recently, illustrates the government's knowledge of the asbestos problem in the war years. The following examples demonstrate the government awareness of the health risks in the shipbuilding effort:

o As early as 1941, the Commander in charge of the Navy's Division of Preventive Medicine warned in a letter to the Surgeon General that asbestos control measures at naval shipyards were inadequate. He wrote, "we are having a considerable amount of work done in asbestos and from my observations I am certain we are not protecting the men as we should. This is a matter of official report from several of our Navy yards."[29]

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[24] See Ships for Victory, supra note 15, at 268-87, 482-85, 663-70.

- In 1941 and 1942, the Navy sponsored courses at Harvard and Columbia Universities for government industrial hygienists assigned to federal shipyards. The hygienists were informed of the health problems associated with asbestos exposure and discussed various safety precautions to reduce hazards.
- Following a government-commissioned survey of 20 shipyards, the Navy and the U.S. Maritime Commission issued, in 1943, "Minimum Requirements for Safety and Industrial Health in Contract Shipyards." The regulations regarding asbestos exposure required that each shipyard appoint a full-time safety director, staff and ventilation supervisor, install ventilation equipment, and provide workers with respiratory protective equipment.

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[29] Memorandum from C.S. Stephenson, Commander in Charge of U.S. Navy's Division of Preventive Medicine, to Admiral R. McIntire, Surgeon General of the Navy (March 11, 1941).

- Between 1943 and 1945, the Navy and the Maritime Commission conducted more than 100 surveys of shipyards to determine if the "Minimum Requirements" were being met. The investigation revealed that most shipyards were failing to meet the safety and health requirements. One survey team at a Portland, Oregon, shipyard expressed concern about the potential danger of asbestos and recommended continued measurement of dust levels. Two years later the same team reported in a follow-up survey that "it was evident that no improvements in the [asbestos] shop had been made and the hazard still exists."[26] The United States restricted the disclosure and dissemination of the information obtained during these surveys and prohibited the shipyards from disclosing the information to the workers.

As these examples indicate, the government was more concerned with wartime ship production than with tight enforcement of asbestos safety standards. In fact, at a conference in shipyard safety in 1942, a federal official, after advising conferees of the precautions to take concerning asbestos, added that "above all the last thing we want is to put through any

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[26] Industrial Health Survey of Williamette Iron & Steel Corporation, Portland, Oregon at 6-7 (March 13, 15, 22, 23, 1945).

[safety] restrictions that will slow up the shipbuilding process."[27]

(d) Government participation in the asbestos market. The government's dominating influence over the use of asbestos extended to its control over the raw material itself. Through the wartime prioritization and allocation machinery, the government virtually nationalized the asbestos industry.

Just before World War II, the government, realizing the strategic importance of asbestos, began stockpiling raw asbestos fiber, and by 1942 the government had contracted to buy 57,000 tons of fiber.[28] The government sold fiber from these stockpiles, at a profit, to manufacturers. In 1943, the government cut out all middlemen and became an importer of asbestos fibers, making purchases directly from African mining concerns.[29]

Once the wartime shipbuilding effort began, the government placed rigid controls on non-military uses of asbestos. First, the asbestos fiber allocation system was established, requiring suppliers to sell their stocks to those companies, including the companies in the shipbuilding industry, with the highest government priorities. By early 1942, the National Defense Commission began issuing conservation orders prohibiting some non-military asbestos use. Ultimately, the federal government directly allocated and scheduled output for all asbestos textile products.[30]

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[27] See Occupational Health Hazards Compensation Act of 1982, Hearings on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Labor and Education, 97th Cong., 2d Sess. 254 (1983) [hereinafter cited as "Health Hazards Hearings"] (statement of Victor L. Drexel, Corporate Counsel, Amatex Corp., as part of a panel representing the Asbestos Compensation Coalition).

[28] See Bowles, O., Asbestos, A Materials Survey, Bureau of Mines Information Circular 7880, at 75 (1959).

[29] See United States Department of Interior, Bureau of Mines Minerals Yearbook, 1942: Asbestos (1943).

During the wartime shipbuilding effort, tons of the fiber stockpiled by the federal government were sold for use by contractors and subcontractors to make the products to which employees were exposed at shipyards and manufacturing plants. Thus, the federal government was a major source of supply for the disease-producing raw materials.

(e) Post-war asbestos use. Despite the government's knowledge throughout the 1940s of the asbestos problem, the United States continued to require asbestos use in a very large number of its shipboard products until at least 1975.[31]

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[30] War Production Board Conservation Order M-123 -- Asbestos Textiles (March 30, 1942) had restricted the sale of asbestos textiles and asbestos-containing packings. These restrictions were combined with Conservation Order M-283 (1943) which placed asbestos textiles under the complete allocation procedure. Bowles, supra note 28, at 75-76, 82-84. See also Health Hazard Hearings, supra note 27, at 253-54 (statement of Victor L. Drexel, Corporate Counsel, Amatex Corp., as part of a panel representing the Asbestos Compensation Coalition).

[31] NAVSEA Instruction 5100.2 (October 24, 1975). Previous Navy directives had been aimed only at the elimination of high asbestos-content thermal insulation materials and at the im-
(Footnote continued)

The government continued to purchase and use supplies of asbestos-containing materials throughout the 1970s. For example, deposition testimony reveals that asbestos thermal insulation was still being used at government shipyards as late as March 1977 and the General Services Administration was still purchasing asbestos cloth as late as August 1977.

In addition, the government has continued its role as a stockpiler and supplier of raw asbestos.[32] Over 70,000 tons were released from government stockpiles during the 1970s.[33] As recently as February 1983, the government tried, unsuccessfully, to find a buyer for 9,300 tons of asbestos fiber.[34]

In short, the government was a crucial participant in the asbestos market. Its role was obvious and direct. Indeed,

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(Footnote 31 continued from previous page) plementation of industrial hygiene measures. See NAVSHIPS Notice 9390 (February 23, 1971); NAVSHIPS Instruction 5100.26 (February 9, 1971).

[32] According to the Bureau of Mines Minerals Yearbook, the government asbestos stockpile inventories totaled 121.2 thousand tons in 1965, 58.7 thousand tons in 1975 and 49.8 thousand tons in 1981.

[33] Figures compiled from U.S. Department of Interior, Bureau of Mines Minerals Yearbook Tables 1 and 2 (1974-1980).

[34] See General Services Administration, Federal Property -- Resources Service, Solicitation of Offers for Asbestos: Amosite Asbestos -- 8,537 Short Tons, Crocidolite Asbestos -- 796 Short Tons, of South African Origin (February 7, 1983). See Isikof, M., "GSA Tried to Sell Thousands of Tons of Asbestos Against Justice Advice," Washington Post, April 4, 1983, at A13.

no single actor played a more important role in promoting the development and use of asbestos products than did the federal government, and no single actor bears a heavier burden of responsibility for the tragedy of asbestos-related disease among American workers today.

3. Appropriate Congressional Response.

Significantly, Mr. Chairman, the American people agree that the government should share responsibility for the asbestos tragedy. In a recent national public opinion survey conducted by Cambridge Reports, Inc., almost eighty percent of those surveyed stated that the government should share the responsibility for compensating workers with asbestos-related injuries as a result of the wartime shipbuilding effort. Forty-four percent said government should share the responsibility with industry, while thirty-five percent said that government should be solely responsible for compensation to injured workers.

Nevertheless, the United States continues to evade its responsibilities to both injured wartime shipyard workers and to its wartime industrial partners. Indeed, the United States -- hiding behind the outdated legal doctrine of sovereign immunity -- is spending millions of dollars annually to deny its responsibility instead of compensating injured workers.

In a situation like this -- where injuries resulted from an enterprise conducted jointly by the United States and private industry to further a national objective -- it is fitting for the government to share the responsibility, rather than leaving its industrial partners to bear the entire cost. Congress, therefore, should instruct the government to contribute its share for its dominant role in the asbestos disease legacy of the wartime shipbuilding program.

Such a recognition of government responsibility is consistent with precedent. On many occasions, Congress has enacted legislation to ensure that government provide some or all of the compensation for injuries or damages resulting from industry-government joint enterprises.[35]

In some cases, Congress has agreed to indemnify its industrial partners who had undertaken potentially injurious projects to further government objectives. For example, in the 1976 National Swine Flu Immunization Program Act,[36] Congress provided for government indemnification of manufacturers, distributors and administrators participating in its mandatory vaccination program. Recognizing the government's role in mandating use of the vaccine, the Act made an action against the United States the exclusive remedy for injury or death from the immunization program.

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[35] Congress has recognized government responsibility in various ways. Until 1946, Congress assumed the obligation of paying for the government's torts by passing thousands of private bills. See Dalehite v. United States, 346 U.S. 15, 25 n.9 (1953). In 1946, to eliminate the clumsy private bill system, Congress enacted the Federal Tort Claims Act, which waived sovereign immunity for certain tort actions against the government. A special waiver of sovereign immunity, which can only be done by Congress, is another means by which Congress recognizes government responsibility for its actions. There have been many such waivers. See Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U.L. Rev. 597, 602 n.24 (1982). Furthermore, as discussed below in text, Congress still passes special bills for those situations not covered by the Federal Tort Claims Act, but where Congress finds that the government should assume responsibility for injuries caused by its actions.

[36] Pub. L. No. 94-380, 90 Stat. 1113 (1976).

Similarly, in the Price-Anderson Act,[37] Congress imposed limitations on plant operators' liability for nuclear accidents resulting from the operation of federally licensed private nuclear plants, and Congress assumed the responsibility to then take any further action necessary to aid the victims of the nuclear incident.[38] Congress thus recognized that -- because of the federal role in encouraging production of nuclear material which was vital to the defense of the country -- Congress bears a responsibility to pass further legislation, if needed, to aid any victims.

Congress has in fact stepped in to assume the government's share of liability where the government played a role in causing an injury, even in the absence of a prior statutory commitment to do so. For example, when a major government project like the Teton Dam in Idaho overflowed, Congress enacted legislation to compensate the victims.[39] Similar compensation was authorized for victims of a disastrous explosion of a shipment of ammonium nitrate fertilizer which was a part of the government's foreign aid program.[40]

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[37] Pub. L. No. 85-256, 71 Stat. 576 (1957), 42 U.S.C. § 2210.

[38] 42 U.S.C. § 2210(e). See Duke Power Co. v. Carolina Environmental Study Gp., Inc., 438 U.S. 59, 86 n.31 (1978).

In 1982, Congress approved legislation allowing for government payment of economic losses suffered by children's sleepwear manufacturers when the Commerce Department banned the use of Tris, a chemical whose use it had previously required under federal flammability standards.[41] In passing the Tris legislation, Congress recognized that, by first requiring and then prohibiting use of the chemical, the government was largely responsible for industry's losses.

Most recently, Congress approved legislation that shifts liability from private contractors to the government for harm due to radiation exposure caused by atomic weapons testing programs.[42]

Thus, there is strong precedent for congressional action that would recognize the government's role in the development and use of asbestos and take some measure of responsibility for the tragic consequences of that role. As in these other special "joint ventures" between government and industry, Congress should now instruct the government to bear its fair share of the liability resulting from occupational asbestos exposure.

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[39] Pub. L. No. 94-400, 90 Stat. 1211 (1976).

[40] Texas City Explosion Relief Act, Pub. L. No. 84-378, 69 Stat. 707 (1955).

[41] Pub. L. No. 97-395, 96 Stat. 2001 (1982).

[42] Section 1631 of Pub. L. No. 98-525, 98 Stat. 2646 (1984).

4. Potential Government Savings from Participation

(a) Litigation cost savings. Equity aside, it is in the government's long-term interest to be a participant in an administrative compensation program for asbestos to replace the inefficient tort system. Such a system will actually save the government substantial costs arising out of current litigation.

The government spends millions of dollars annually in litigation expenses and these expenses can only increase as the question of federal responsibility is raised repeatedly in asbestos litigation. Over 40 lawyers and other professionals in the Justice Department and elsewhere in the government are comcommitted full-time to asbestos litigation. In fiscal year 1983, Congress appropriated $5.9 million for asbestos litigation expenses, and, by fiscal year 1985, government asbestos litigation expenses nearly doubled to $10 million. These litigation expenses do not include the costs to the federal judiciary of asbestos litigation, which are estimated at $40 million annually.[43] Nor do these expenses include the $152 million allocated in the Justice Department's original budget justification for fiscal year 1985 to pay asbestos claims where the government is found liable for injury.

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[43] Storey & Hatch, Compensation for Victims of Asbestos-Related Diseases: Potential Cost Savings for the Federal Government (Urban Institute Research Paper 3269-01, March 1983).

Further, the government already pays asbestos victims for their injuries indirectly through Social Security, Medicaid, food stamps and other income assistance programs. According to the Urban Institute, depending on how Congress structures the administrative compensation program, such a system could save the government from $19 million to $82 million annually in indirect payments to asbestos victims and their survivors.** Participating in a compensation system would save substantial amounts for the government, which could offset a major portion of the government's share of responsibility for funding the system.

(b) Avoiding risk of enormous federal liability. Even more significantly, retaining the present tort system as the means to resolve the asbestos tragedy leaves the government subject to the risk that it will be held liable for enormous tort damages in the years to come.

Several manufacturers, including Raymark, have already filed a number of lawsuits seeking indemnity and contribution from the federal government for amounts already paid. Examination of emerging legal trends will bear out the observation that it is now only a matter of time before the government is found liable for a substantial part of the asbestos disease compensation.

** *Id*. at 4.

The government's chances of escaping legal liability were greatly diminished by the Supreme Court's 1983 Lockheed decision.[45] Where a federal employee sues a product manufacturer, the Court said that the manufacturer may sue the government for contribution or indemnity, even though an action by the injured federal employee directly against the government would be forbidden. This and other principles have now been applied to permit asbestos product manufacturers to seek reimbursement from the federal government at least where asbestos exposure took place during construction on a government-owned vessel.[46]

The government's legal position was further eroded by a very recent decision by a federal court in San Francisco in a case brought by the Manville Corporation.[47] The court found that, due to the special relationship between the asbestos manufacturer and the government, Manville's allegations that the government did not exercise reasonable care supported a cause of action sounding in tort.[48]

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[45] Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

[46] See In re All Maine Asbestos Litigation, 581 F. Supp. 963, 975-77 (D. Me. 1984), 589 F. Supp. 1571, 1574-76 (D. Me. 1984); Colombo v. Johns-Manville Corp., No. 82-0685 [Dec. 7, 1984 issue] Asbestos Lit. Rptr. (Andrews Publications) at 9340, 9348 (E.D. Pa. Nov. 19, 1984).

[47] Johns-Manville Sales Corp. v. United States, No. C81-4561 RFP (N.D. Cal. Aug. 21, 1985) (order regarding motion to dismiss).

[48] In a recent decision, the U.S. Court of Appeals for the Ninth Circuit held that the United States can be sued for the cancer

(Footnote continued)

Thus, emerging legal trends, as illustrated by the Supreme Court's Lockheed decision and the recent Manville case, indicate the government is in danger of being found liable for a substantial part of the asbestos tort costs.

The United States should take heed of this emerging trend. Our company has been dealing with this problem since the early seventies, and I see that the United States is now in the position the asbestos manufacturers were in over a decade ago. We saw a handful of cases but we did not realize those cases were really the tip of an enormous iceberg. We were not prepared for the flood of litigation that followed. In fact, in recent testimony before the House Judiciary Committee, the head of the Justice Department's Civil Division disclosed that government lawyers are now handling over 2700 asbestos cases, in which individuals and asbestos manufacturers are seeking to have the government pay compensation for over 60,000 claims. He predicted that by 1990, over 200,000 claims for over $38 billion could be pending against the government.[49] The trends in the law are unmistakable and the government risks being subject to multi-billion dollar liability.

(Footnote 48 continued from previous page)
death of an American serviceman exposed to radiation at Nagasaki, if the government wrongfully failed to warn him of the danger of that exposure after he left the service. Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985). A similar theory may be applied in the asbestos litigation.

[49] Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th
(Footnote continued)

Government participation in a compensation program for asbestos, however, would eliminate the increasing risk that the government will be held liable for such substantial tort damage awards. If the government is to avoid the risk of enormous loss, it is in the United States' best long-term financial interest to contribute -- along with its industrial partners -- to the funding of an administrative compensation program for asbestos.

B. Preventing Runaway Costs to the Federal Treasury

Mr. Chairman, while the federal government should indeed contribute its fair share to asbestos compensation, it is absolutely essential that any administrative compensation program for asbestos must prevent an undue drain on the Federal Treasury. We must avoid some of the mistakes of the past -- which may have produced runaway costs in some federal compensation programs -- and we must avoid creating any precedent that could lead to inappropriate federal costs in the future.

First, I must emphasize that the kind of program proposed in the "Asbestos Workers' Recovery Act" would establish no harmful precedent that the United States should contribute to victim-compensation programs generally -- because the situation

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(Footnote 49 continued from previous page) Cong., 1st Sess. (March 20, 1985) (statement by Richard K. Willard, Acting Assistant Attorney General, Civil Division, Department of Justice).

involving asbestos is different from that involving hazardous substances. The pervasive federal involvement in wartime asbestos use is totally different from the general regulatory role the government ordinarily exercises with regard to hazardous substances. This bill would not have the United States bear liability because of any failure to regulate adequately, or on account of any other general governmental function; rather, the government would be made accountable for its own commercial and industrial activities involving asbestos -- importation, production, distribution, and use -- just as a private company may be held liable for the same kinds of activities.

I also believe it is essential to structure any asbestos compensation program to prevent excessive federal costs. Please consider the following examples of how this could be accomplished:

o The amount of the federal contribution to asbestos compensation should be calculated to reflect the actual extent of federal involvement in the asbestos tragedy.[50]

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[50] As I discussed above, since the United States bears particular responsibility for the operation of the shipbuilding program, and particularly for the asbestos exposure that resulted from shipbuilding, a 50% government contribution is an appropriate initial proposal -- corresponding to the approximately 50% of our litigation that arises from wartime shipyard exposure.

- Contributions by private companies and by the federal government should rise if the number of claims rises, so that current expenses of the program can be met without the need for long-term loans from the Treasury.

- If budgetary estimates for the program are exceeded, the entire program should automatically sunset, unless Congress acts to bring the program's budget back into balance.

All of these mechanisms to protect the federal Treasury are incorporated in S. 1265.

Through provisions such as these, I am convinced, Mr. Chairman, that Congress can find a way to accept the government's appropriate share of responsibility for asbestos compensation, while assuring that federal budgetary constraints are not exceeded.

C. Preservation Of Existing Compensation Programs

A third point involves the structure of a compensation program. Some legislative proposals have advocated that the responsibility for asbestos should be shifted from existing state workers' compensation agencies to a new federal workers' compensation program to be administered by the federal Labor Department.

However, I do not believe it is time to give up on the existing state workers' compensation system. This proven system, already in place, would provide an efficient mechanism for processing asbestos claims and avoid the need for creating a new and expensive bureaucracy. I therefore urge that any asbestos legislation be carefully drawn, to provide prompt and equitable benefits without undermining the integrity of the workers' compensation system generally.

To accomplish this, the "Asbestos Workers' Recovery Act" would establish a new asbestos remedy that replaces tort remedies, but that supplements, rather than replaces, existing workers' compensation.

The proposed new asbestos program would rely on existing state and federal workers' compensation agencies to make initial medical and other decisions establishing eligibility for benefits. Any worker who is certified by his compensation board would automatically be entitled to a "supplemental benefit" from the federal fund. Such a system would avoid the creation of a new Labor Department bureaucracy pre-judging or second-guessing workers' compensation decisions.[51]

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[51] S. 1265 would not establish a federal workers' compensation program, which might best be implemented by the Department of Labor. Rather, the critical federal responsibilities would be nationwide handling of claims and payment of benefits, and consideration of issues on the forefront of medical knowledge -- responsibilities for which the Department of Health and Human Services would be best suited.

Overall, existing compensation systems work rather well, and it seems prudent to build upon this established, working system. However, there are some problems, and, without imposing any federal standards on state programs, the "Asbestos Workers' Recovery Act" would assure that unreasonable procedural or jurisdictional deficiencies in state programs do not interfere with providing a supplemental benefit under a new asbestos compensation program.

If workers' compensation is denied because of some procedural or jurisdictional barrier in the workers' compensation system -- such as a statute of limitations or a rule that certain kinds of exposures or diseases are not compensable -- the new supplemental program would disregard this barrier and require the Department of Health and Human Services to render an independent decision whether the supplemental benefit should be awarded. An independent federal decision regarding eligibility for the supplemental benefit would also be required if a workers' compensation decision is unduly delayed, or where a compensation claim was settled without a determination of eligibility.

Such an approach would undoubtedly have some impact on workers' compensation costs, because more claimants would be encouraged to file for compensation. The "Asbestos Workers' Recovery Act" would also assure that the supplemental benefit provided by the new program would be retained by the claimant, rather than being subject to a workers' compensation "subrogation lien," thus preventing the employer or its insurer from transferring workers' compensation costs to product manufacturers.

As a quid pro quo for these impacts on workers' compensation costs, however, the legislation would end all tort litigation against the employer who used asbestos products, so that no suits would be allowed by either the product manufacturers or the injured employees against the employer.[52] The workers' compensation system was designed to be the principal system for providing compensation for occupational disease, and the "Asbestos Workers' Recovery Act" would assure that this role is retained and strengthened.[53]

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[52] This concept is endorsed, for example, in the Report of Crum and Forster's Occupational Disease Task Force, in the following terms:

> There is, however, some merit to proposals requiring that workers' compensation awards paid or payable be deducted from third-party tort awards, and that the workers' compensation lien be abolished in return for immunity against direct legal indemnity or contribution proceedings in products liability cases. The employer is in the best position to provide protection to the worker from exposure in the workplace, because the employer selects the materials and substances that are used in the workplace. Thus, any inequity this provision would create is slight, and the employer would receive the benefit of reinforced immunity from suits by employees.

Role of the State Workers' Compensation System in Compensating Occupational Disease Victims, Report of Crum & Forster's Occupational Disease Task Force 46 (June 1983).

[53] An increased workers' compensation caseload could also have some impact on compensation agency costs, but the legislation

(Footnote continued)

I recommend that eligibility for a supplemental benefit should depend on determinations of eligibility under existing compensation programs, because in my view -- which is supported by most people I have spoken to -- a new supplemental benefits program for asbestos would pose a risk to existing compensation systems if it established a new federal bureaucracy that prejudged or second-guessed decisions made by state and federal compensation programs. However, this is a matter of judgment and there may be other opinions.

Another alternative to be considered, therefore, would be to replace the tort remedy with a claims-handling mechanism operating totally without regard to the workers' compensation system.

(Footnote 53 continued from previous page) would include provisions to help alleviate the burden on state agencies. For example --

- o The federal government would enter into contracts with state agencies -- if they wish -- under which the state agencies would handle many functions under the new asbestos compensation program. Payments to the state agencies under these contracts would allow the state agencies to develop enhanced capacity to handle asbestos-related claims generally.
- o In addition, federal legislation would establish a program of direct grants for state compensation agencies and other organizations, to fund development of pilot programs to improve the handling of asbestos-related occupational disease claims.

All costs of these programs would be paid out of the fund established to pay supplemental compensation, funded by the responsible asbestos parties.

Whatever approach is used, however, I believe that any federal legislation should not displace the existing workers' compensation mechanism. If there are problems in existing workers' compensation programs, such as inadequate benefit levels or unfair technical barriers to recovery, I would certainly support efforts to solve them at the state level.[54] I therefore support the concept of replacing the litigation with an equitable administrative payment, but while leaving workers' compensation intact.

D. Certainty and Promptness of Insurance Availability

Finally, any new program should recognize that all of our liability insurance policies paid for over the past decades should be available to us.

There is already enormous dispute and litigation, as I mentioned earlier, between manufacturers and producers, on the one hand, and our insurance carriers on the other.[55] This complex, lengthy, and costly litigation has had an important impact on some of our companies because, as long as the disputes remain unresolved, we have been unable to collect on some of our policies.

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[54] See generally Report of Crum & Forster's Occupational Disease Task Force, supra note 52.

[55] In part because asbestos diseases do not become manifest for many years after exposure to the dust, a debate is raging as to when an insurer is responsible for defending the insured company and paying the award. There are two primary areas of disagreement:

- Which policies apply to a particular victim -- the ones covering the period of exposure to asbestos, the ones covering the latency period, the ones covering the time the disease became manifest, or all of the above?

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This causes difficulties enough under the present protracted litigation. However, if the new administrative remedy is prompt, as we all intend it should be, any insurance dispute not settled by the legislation could delay a company's ability to collect under its policies -- with potentially devastating consequences. How ironic it would be if the legislation succeeded in streamlining the process for resolving employee claims without litigation, but failed in its ultimate mission because insurance litigation made it impossible to obtain the funds promptly enough to pay the needed benefits!

I therefore urge that a reasonable, uniform rule be established to govern how existing insurance would be applied to pay for assessments under the new administrative program. There is no practical or legal reason for hesitation in this regard. The insurers received millions of dollars in premiums as compensation for bearing the tort exposure and litigation expense that

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(Footnote 55 continued from previous page)

- o What is the extent of coverage under each policy, for a kind of injury that was never anticipated when the policy was written decades ago.

Due to these disputes, some insurers pay nothing under their policies until ordered to do so by a court.

the new federal program would eliminate. Furthermore, under the new administrative program, the insurance companies -- as much as or more than the asbestos product producers -- will enjoy the benefits of reduced litigation expenses and other transaction costs, and the increased predictability of costs. Without a rule such as I suggest, the exposure of the insurance companies would be at least as uncertain and vigorously disputed as it is today. If tort liability were eliminated but rules were not established providing for payment of the assessments out of existing insurance, the insurance companies could reap a windfall of millions of dollars, and the new program might not be affordable by the asbestos product suppliers.[56]

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[56] Such an approach is certainly within Congress's authority under the Constitution. In general terms, Congress may make reasonable adjustments to contractual obligations to avoid an unintended windfall or burden and to avoid dispute and litigation. See City of El Paso v. Simmons, 379 U.S. 497 (1965). One appropriate technique for making such adjustments is for the legislature to refer to a principle of judicial construction, and derive from it a general rule to apply to existing contracts. See Gelfert v. National City Bank of New York, 313 U.S. 221, 233 (1941).

With regard to insurance contracts in particular, Congress or a legislature may make such reasonable adjustments in the terms of existing insurance arrangements as may be necessary to achieve a compelling general social objective of a legislative program. So, for example, as part of New York's no-fault automobile statute, the legislature required carriers to extend the life of existing policies for a certain period. The court upheld this requirement because it was needed to sustain the overall scheme:

> The same public interests which justified the imposition of the entire No-Fault scheme support this aspect of the statutory framework. The law accomplishes a legitimate public goal

(Footnote continued)

It would also be valuable to establish a special judicial tribunal to provide prompt, uniform decisions for any insurance disputes. Such a special-purpose tribunal was established to resolve disputes arising out of the Penn Central reorganization,[57] and the need for such a tribunal may be no less acute here. Indeed, in establishing a new program, it is common practice for Congress to designate a single court to hear disputes under the program.

(Footnote 56 continued from previous page)
and any contract right must yield to it.

Country-Wide Ins. Co. v. Harnett, 426 F. Supp. 1030, 1035 (S.D.N.Y.) (citation omitted), aff'd mem., 431 U.S. 934 (1977).

Likewise, in Travelers Ins. Co. v. Marshall, 634 F.2d 843 (5th Cir. 1981), the court reviewed provisions of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. The court construed the statute to add a new term of liability to existing policies, but found this approach constitutional on the grounds that it is a "rational method for achieving Congress's goal of compensating those injured in maritime employment. . . ." Id. at 849.

The contemplated asbestos legislation would involve even a lesser alteration of existing contract terms, because the bill would not add on an additional term of liability as did the Longshoremen's amendment, but would instead substitute liability under the new remedy in place of whatever tort liability under the policy would be eliminated. Any extension of coverage under the new legislative framework would also tend to be offset by limits on benefits, reduced litigation expenses, and increased certainty in amount of liability, which the new program would provide. And the purpose of the legislation would certainly be appropriate and compelling -- to prevent a windfall for the insurance companies, and to eliminate disputes that may threaten the prompt implementation of an essential compensation program.

[57] See 45 U.S.C. § 719(b) (1976) (establishing special court for Regional Rail Reorganization Act cases).

The "Asbestos Workers' Recovery Act" includes provisions such as I have described that are designed to assure that we are able to call upon all of our insurance policies to provide funding for the new program. I hope that I and other representatives of the asbestos product producers will have the opportunity to work with this Subcommittee -- and with the insurance industry -- to arrive at a precise and fair definition of the insurance obligation under the new compensation program, and to develop appropriate rules and processes to assure that disputes over insurance coverage do not impede the funding of the program.

CONCLUSION

Mr. Chairman, the existing situation clogs our already overburdened courts, stifles business operations, and imposes unfair burdens on injured workers. It helps only the lawyers.

The "Asbestos Workers' Recovery Act" is a major step forward toward assuring worthy claimants of prompt, certain and fair compensation and eliminating the enormous and wasteful costs and inequities of the existing system. In the weeks and months ahead, I pledge that I, and others in my company, will offer whatever help we can to further develop -- and ultimately enact -- this worthy legislation.

Senator **Durenberger**. What is the current nature of Raymark's business and how does it relate to utilization of asbestos?

Mr. Ross. The fact of the matter is that Raymark has not engaged for a number of years in manufacture of the products, the asbestos products, that contributed to this injury which actually occurred predominantly during the World War II and the Korean war and Vietnam. The products that we make today, I would say approximately 50 percent of them contain some asbestos, but they are quite different products. They are products called friction materials—brakes, clutch facings and things of that kind where the asbestos is completely encapsulated. And, as a matter of fact, the trend in our industry today is to move very quickly away from asbestos, and I would suspect in a relatively few years the asbestos content even in those products would be relatively minimal. But those are not the products which contribute to the lawsuits from which the company is suffering today.

Senator **Durenberger**. And what primarily is the source of the utilization of asbestos giving rise to the claims? Is it insulation or in some other use?

Mr. Ross. Speaking for Raymark itself, the main product that gives rise to these cases is a fabric which we manufactured, as I said, during the wars, and was used for a wrapping around insulation, which was applied to the pipes on ship board. So all we ever made was the fabric. Other companies supplied insulation and other products, but we did not substantially participate in that market.

Senator **Durenberger**. What other kinds of products has your company made since the war that contain asbestos?

Mr. Ross. We have made products—packings, gaskets. We continued for a considerable number of years to make the same type of woven tape and fabrics which were used for a whole variety of programs, ranging from shipbuilding to the space program where we made rocket nozzles and nose cone products, and things of that kind, where even today the Government still specifies that certain of those products must contain asbestos. Their composition, however, is quite different. The products we are talking about as having contributed to this problem were textile products. They were woven products. Whereas, the kinds of products that are used in the space program and things of that kind are plastic products which contain asbestos primarily as a reinforcing material or what they call an oblative material.

Senator **Durenberger**. What they call what?

Mr. Ross. Oblative. It absorbs the heat in the process of either firing a rocket or entering the atmosphere or something of that kind.

Senator **Durenberger**. At what point in time over the last 50 years or so did Raymark change the way in which asbestos was incorporated into its products or the way in which it was manufactured to reflect the dangers to workers at either end of the process—either your end of the process or at some installation?

Mr. Ross. Well, Raymark, for many years, including the period of time we are talking about in the 1930's and the 1940's, in its own plants always exercised the greatest care in protecting its workers. In fact, Raymark was cited by the States of North Carolina, Pennsylvania, and Connecticut at various times during the 1930's and 1940's as having plants that were exemplary from the standpoint of worker protection based on the technology that was known at that time. So it's been a policy and practice of our company consistently over this period of time to try as best we could, and I think quite successfully, to consistently protect both our customers and our workers against the hazards of asbestos.

It was relatively more recently that companies such as Raymark became aware that their customers were at risk in these situations, as well as their workers. In the early 1930's, companies were aware that people who manufactured asbestos products could be in danger of some kind of disease, although there was relatively little known about that. It wasn't until, oh, I guess, the late 1960's or early 1970's that companies became aware that users of their products could also be exposed to that hazard. And at that time, we began to warn people; we began to undertake research projects to try to find substitutes, of which there is none for asbestos. There is no individual fiber which you can drop into a whole series of compositions and replace asbestos. In every case, it's a matter of reformulating, redesigning, and very often, redesigning not only the product we supply, but the end product of which ours is a component. So it's quite a complex process to replace asbestos.

Senator DURENBERGER. Senator Armstrong.

Senator ARMSTRONG. Thank you, Mr. Chairman.

Mr. Ross, evidently you don't think that a privately negotiated solution is really going to work out. You referred to the Wellington Group, I think, with some sense of approval. But in the final analysis, you just don't think that's the answer?

Mr. ROSS. Senator, I think it's a step in the right direction, and I support and encourage and applaud, as a matter of fact, the fine effort that has been made by the insurance companies and members of our industry in reaching the point that they have with the privately negotiated settlement.

But I think inherently a private settlement has certain flaws that are unavoidable, the biggest of which is perhaps the fact that the Government does not participate.

Senator ARMSTRONG. That is, that the Government does not pay its share of the cost of the settlements, which you feel they should be obligated to pay.

Mr. ROSS. Absolutely. I think—people refer to a Government bailout. This is not a Government bailout. This is a case today where the industry is bailing out the Government. On any equitable basis, if you look at the facts, you will find that their control of the shipyards, their supply of asbestos materials, which was fully as great as any private company, and their ownership of the ships, their ownership of many of the shipyards, their direct employment of the people who worked in the shipyards for many, many reasons, looked at on an equitable basis, the Government, indeed, should be funding a substantial part of this cost. And they are not because of this doctrine of sovereign immunity.

Senator ARMSTRONG. It's your position that the Government is not protected by the sovereign immunity, that they could clearly be liable under the present laws?

Mr. Ross. I don't think there is any question about that. And I think that if we let this litigation go on long enough, God forbid, the Government will eventually be dragged into this situation, and they will be in just as bad a spot and they will be wasting just as much money on legal fees as the members of private industry.

Senator Armstrong. What do you say to the argument that opponents of this legislation have made, and which may be made this morning, that this kind of an approach violates the constitutional rights of victims? That we are shutting them off from the chance to go to court and sue and presumably get a better settlement than they would be able to get under this legislation?

Mr. Ross. Well, I don't think it violates constitutional rights any more than workers' compensation or other administrative settlement arrangements that the Government has previously engaged in. I think of greater concern is the very real and immediate threat that the companies that are having to pay these bills will go out of business. And there may, in fact, be no funds left to take care of future claimants.

I referred in my testimony to the fact that 27,000 claims have been filed. Some have forecasted that 52,000 claims may ultimately be filed. Who is going to pay for all of that? And the tragic thing is that it's not the fact that victims are being compensated that is sapping the resources of industry. It's the fact that 63 cents of every dollar that is paid is going to lawyers. And it's that issue that we are trying to get at. We believe that there are many victims out there who, indeed, should be compensated. But I see no reason why this country should countenance a system that is so wasteful that it has 63 cents on every dollar of transaction cost. And I don't believe that violates anybody's constitutional rights.

Senator Armstrong. Mr. Ross, I thank you for your statement.

And, Mr. Chairman, I have a number of other questions which, after we have heard from other witnesses, I may submit to some of those who testify for their written response. And if that's the case, I would like to include that in the record as well.

Senator Durenberger. All right.

Mr. Ross, I thank you very much for your testimony, and your response to the question.

Mr. Ross. Mr. Chairman, if I might request, I plan to stay and listen to other testimony this morning, and I would like to have the privilege, if it's appropriate, to submit some further written testimony perhaps amplifying on things that other witnesses say.

Senator Durenberger. As I indicated earlier, the record will remain open for perhaps several weeks for additional testimony.

Mr. Ross. Thank you very much.

Senator Durenberger. The next witness is Mr. Johnny McKinney, chairman and chief executive officer of the Manville Corp., Denver, CO.

Mr. McKinney, we welcome you to the hearing. Your full statement will be made part of the record, and you may proceed to summarize it.

STATEMENT OF JOHN A. McKINNEY, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, MANVILLE CORP., DENVER, CO

Mr. McKINNEY. Thank you, Mr. Chairman.

I wish to make two primary points this morning. First, our hands-on-experience in almost 10 years of intensive litigation in the asbestos cases provides the proof that the tort system is incapable of dealing fairly or wisely with asbestos health claims. The litigation is unfair because it routinely discriminates against similarly injured plaintiffs, awarding one substantial damages while the other receives little or nothing.

And the litigation is unwise because the judiciary is structured so that it is unable to see the forest for the trees. With its focus on the individual case before the court, it orders payments with no sensitivity to our inability to finance compensation at such levels for the total numbers of persons expected to file claims both now and in the future.

For example, a judge consolidated five asbestos disease cases in which five juries simultaneously heard the same evidence and reached five distinctly different verdicts ranging from completely for to completely against the plaintiff. A jury found against a dying plaintiff because the jurors simply didn't like his lawyer. Two workers from the same shipyard sued our company in different States. One who died received nothing on the basis that the shipyard was responsible for his injuries. The other, not really impaired, received a verdict for $1.1 million. A jury awarded a man in his eighties over $1 million for lung changes which caused no functional impairment.

Of the 244 mesothelioma claims, Manville was able to resolve in 10 years of asbestos litigation, 124, or about half, shared $14.9 million, an average of about $120,000 each. The other half shared $773,608, or an average of $6,447 each. These were, of course, all death cases.

In short, the tort system is not a very rational or consistent method for evaluating and compensating asbestos claims. In fact, through its constant evolution of new liability theories, including payment for merely speculative damages, the tort system jeopardizes our ability to assure some present and all future claimants that funds will be available to compensate them if they manifest asbestos disease.

For these reasons, we believe strongly that Congress should intervene, assess the facts, and enact solutions that protect the long-term public interest.

The second point I wish to make, Mr. Chairman, is that as Congress wrestles with this issue, one of the central matters it must consider is the question of Federal Government responsibilities to workers injured by asbestos.

Let me make my own views on this point clear. Consider these facts: An asbestos-containing product was specified as the only acceptable shipboard insulation as early as 1887 because of its fire-resistant qualities. Manville didn't make that product until at least 15 years later. By World War II, that product had been used for over 50 years, and I know of no evidence that its use in those 50 years ever caused any disease. The specification for that product was changed in 1938 in a way that required use of a type of asbestos fiber not mined by any U.S. companies that I am aware of.

In that same year, the U.S. Public Health Service completed its study of asbestos disease and recommended a standard for exposure. The Navy and Maritime Commission adopted that standard, but did not comply with it.

During World War II and for some time afterward, the U.S. Government was the largest buyer, user, and seller of asbestos fiber in U.S. history. As you probably know, the Government remains an asbestos fiber seller today.

Yet the way the tort system operates today, private industry is being asked to shoulder the burden for the Government's own negligent acts. This is not right and is sufficient justification alone for legislative action.

I've said this before and I say it again—we, in industry, are prepared to compensate for the injuries we may have caused. All we are asking is that we not perpetuate a system that allows the Government to transfer liability for its actions to industry as well.

It is clear from legislation such as the 1946 Lucas Act that Congress never intended for wartime contractors to bear a liability for their performance of mandatory defense contracts, and the Government's conduct of the war.

Again, Mr. Chairman, we simply ask that the private sector not be asked to bail out the Government.

Mr. Chairman, the bill before the subcommittee today, S. 1265, the Asbestos Workers' Recovery Act, incorporates the fundamental principles necessary to ensure that a legislative program of the kind I have advocated is both fair and workable. While the bill surely will be refined in the legislative process, we wholeheartedly endorse its consideration in the Senate.

In past Congresses when I have testified in favor of asbestos disease compensation legislation, it has often been characterized by contingent fee lawyers as a request for a bailout. And this was always accompanied by a recitation of the alleged misdeeds of the asbestos industry, and wild tales that legislation somehow relieved us of a great financial burden. To these critics I can only say that Manville has offered in its chapter 11 negotiations to pay all that it possibly can pay to asbestos claimants while still surviving as a viable corporate entity. We are prepared to pay that money into a vehicle that is provided by our reorganization plan or we will pledge to pay it under a legislative compensation program, such as S. 1265.

So for Manville, legislation may not alter our financial commitment, but legislation, not one company's chapter 11 plan, remains the preferable course. Only legislation can rationalize the process by which asbestos claims are evaluated, assuring that the more seriously injured always receive more than their less seriously injured counterparts.

In effect, legislation is the public's assurance that the dollars Manville and other responsible parties must pay will go only to those who truly need and deserve them.

Thank you, Mr. Chairman.

[The prepared written statement of Mr. McKinney follows:]

Manville News

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Monday, September 9, 1985

MANVILLE CHAIRMAN TESTIFIES
COMPENSATION LEGISLATION STILL ESSENTIAL

(Washington, D.C.).......Manville Corporation's Chairman of the Board, John A. McKinney, testified before a Senate Finance subcommittee today that "the real utility to asbestos compensation legislation is that it rationalizes the process by which asbestos-health claims are evaluated, assuring that the more seriously injured always receive more than their less seriously injured counterparts."

Speaking before the Senate Finance Committee's Subcommittee on Health, McKinney reiterated his view that "federal legislation is essential if the asbestos tragedy is to be resolved fairly and completely." The tentative agreement on the essential elements of a Reorganization Plan Manville has reached in its Chapter 11 negotiations amounts to both a floor and a ceiling on what Manville will pay, McKinney indicated, but it does not stipulate who shall be paid or how each claim is to be evaluated.

Stating that it "is more important to compensate injured parties than it is to continue to litigate issues that, like it or not, have been litigated endlessly over the past ten years," Manville's Chairman and Chief Executive Officer related why no other solution resolves the full compliment of issues that must be addressed to solve the asbestos tragedy. Product liability reform legislation, he noted, "leaves us litigating in a tort system that makes no sense for determining responsibilities in a mass torts situation."

Private, voluntary claims-handling procedures -- such as the Wellington Agreement -- "represent the private sector's positive attempt to impose some order upon a chaotic tort system," McKinney analyzed, "but they are not a comprehensive resolution of the asbestos problem in which all victims are guaranteed the right to compensation and in which uniform compensation of like injuries is the rule, not an accidental by-product."

Manville's own Chapter 11 proceedings, as well as those initiated by other asbestos product manufacturers, "also suffer

(-more-)

obvious limitations," McKinney said. Among other things, "they apply only to the specific companies who are the Chapter 11 petitioners" and "they do not necessarily yield comparable claims evaluation procedures from petitioner to petitioner."

"Where existing institutions prove themselves incapable of handling fairly a large public health tragedy such as that associated with excessive asbestos exposure; where the critical issues have been litigated over a sufficient period of time so as to permit a clear apportionment of the liability; where continued reliance on inefficient systems threatens the ability of future claimants to receive compensation; and where legitimate questions of federal government culpability are concerned; then in these instances," McKinney concluded, "we believe that the Congress should intervene to assess the facts and to enact solutions that further the long-term public interest."

Today's Senate hearing was convened regarding proposed legislation S. 1265, the Asbestos Workers Recovery Act. McKinney indicated that Manville "fully supports its consideration, refinement, and hopefully, enactment." Identical legislation (H.R. 1626) is pending in the House, where three days of hearings have already been held by the Labor Standards Subcommittee chaired by Congressman Austin Murphy.

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STATEMENT OF

JOHN A. MCKINNEY
CHAIRMAN OF THE BOARD AND
CHIEF EXECUTIVE OFFICER
MANVILLE CORPORATION

BEFORE

THE SUBCOMMITTEE ON HEALTH
OF THE SENATE FINANCE COMMITTEE

REGARDING

S. 1265, ASBESTOS WORKERS RECOVERY ACT

SEPTEMBER 9, 1985

Good morning, Mr. Chairman. My name is John A. McKinney, and I am Chairman of the Board and Chief Executive Officer of the Manville Corporation. Manville is a diversified international manufacturing and natural resources supplier with primary businesses in insulation, forest products, roofing and mining. Previously, the company was a leader in the manufacture and sale of asbestos-containing products, the estimatable contingent liability resulting from which led to our filing of Chapter 11 Reorganization petitions in August, 1982.

Mr. Chairman, in the more than ten years now that I personally have devoted to finding a fair mechanism for compensating victims of the asbestos disease tragedy, volumes have been written regarding the medical and legal facts underlying the problem. It is indisputable that excessive exposure to asbestos can cause debilitating, sometimes fatal, disease --

although the medical community cannot tell us why any one individual will contract a disease while his fellow employees, exposed to the same levels of asbestos dust, are unaffected.

It is similarly indisputable that tens of thousands of Americans have received sufficient exposure to asbestos, almost exclusively in connection with their employment, to experience impairment or disability - or possibly die - as a result. Scientific estimates of the total population at risk vary tremendously, but even if only the low-end estimates are accurate the asbestos tragedy represents an occupational disease tragedy without parallel in this country.

And, Mr. Chairman, while it is indisputable that all those involved in the manufacture, sale, and use of friable asbestos products must recognize a necessity to help compensate those workers actually injured by exposure to asbestos products, it is likewise indisputable that the courses we have followed to date have been the wrong ones to achieve this simple goal. For employers, the "compensation necessity" takes the form of workers' compensation benefit payments (both wage replacement and rehabilitation/medical expenses), the traditional, and previously exclusive method by which occupational injuries are meant to be compensated. For third-party manufacturers, the "compensation necessity" has taken the form of damage awards obtained through costly and grossly inefficient tort litigation. As the RAND Corporation's Institute for Civil

Justice has reported, while over $1 billion was spent during the first ten years of asbestos personal injury litigation, only $236 million, or 23 percent of the total spent, actually reached the injured parties for whom it was intended.

If there is an asbestos "crisis," and we think there is, then it derives from this latter area. With a reported 30,000 asbestos lawsuits now pending in state and federal courts throughout the nation, and with new lawsuits continuing to be filed at a rate of at least 6,000 per year, the burden upon existing legal institutions is obvious.

There are those who maintain that the traditional roles assigned to the fault-based tort system of punishment of wrongdoers for their harmful conduct and deterrence are values to be maintained, regardless of the scope of the problem to be addressed. In some cases this may be true, but in the case of asbestos, these goals lose any real meaning: the defendants are being punished for manufacturing products that the U.S. Government insisted were critical to the national defense; and the defendant manufacturers have not produced the asbestos-containing thermal insulation products that spawned the tragedy for a number of years. Moreover, the sheer numbers of persons who require compensation for an asbestos-related injury, coupled with the long latency period between the harmful asbestos exposures and the resulting injuries, render the goals of punishment and deterence largely ineffectual and inappropriate. If anything, continued reliance on the tort litigation only threatens the private sector's ability to compensate any future claimants. The evolution of novel theories of liability, assessment of substantial awards for speculative and punitive damages, and the failure of one of the major culpable parties -- the federal government -- to accept its share of the responsibility in the asbestos tragedy all interact to make this complex litigiation even less fair and less manageable.

Mr. Chairman, I remain convinced that an alternative to the morass of tort litigation is essential and is a matter of pure common sense. Indeed, it is only through a non-adversarial mechanism that we may focus our collective attention on the real issue: offering fair compensation to each and every person injured by asbestos, both now and in the future.

Our belief that it is more important to compensate injured parties than it is to continue to litigate issues that, like it or not, have been litigated repeatedly over the past ten years forms the bedrock for our view that a legislated remedy to the asbestos-disease compensation issue is essential. Quite simply, no remedy other than legislation allows us to commit our full resources to providing compensation:

> product liability reform proposals such as S. 100, even when modified to include voluntary compensation systems, still leave us the prospect of litigating in a tort system that makes no sense for determining responsibilities in a mass torts situation like the asbestos problem;

> private sector, voluntary claims-handling procedures - as positive a development as they might be - also are grounded in the tort system, and additionally are by their very nature limited to approaches within the sole ability of the private parties to negotiate. In short, they represent the private sector's positive attempt to impose some order upon a chaotic tort system, but they are not a comprehensive resolution of the asbestos problem in which all victims are guaranteed the right to compensation and in which uniform compensation of like injuries is the rule, not an accidental by-product.
>
> Chapter 11 reorganization plans, while also potentially helpful, also suffer obvious limitations -- they apply only to the specific companies who are the Chapter 11 petitioners; and they do not necessarily yield comparable claims evaluation procedures from petitioner to petitioner. Again, continuity and fairness cannot be assured to all claimants. And the nation's Bankruptcy Courts should not be expected to provide uniform and comprehensive solutions to all of the difficult questions attendant to occupational disease compensation.

Where existing institutions prove themselves incapable of handling fairly a large public health tragedy such as that associated with excessive asbestos exposure; where the critical issues have been litigated over a sufficient period of time so as to permit a clear apportionment of the liability; where continued reliance on inefficient systems threatens the ability of future claimants to receive compensation; and where legitimate questions of federal government culpability are concerned; then in these instances we believe that the Congress should intervene to assess the facts and enact solutions that further the long-term public interest.

All of the above conditions are present in the asbestos litigation, and for this reason we believe the appropriate Congressional response is to legislate. As I indicated earlier, Mr. Chairman, I have actively sought legislative consideration of the asbestos issue for over 10 years now. During that time, we have endorsed a number of different legislative approaches, each succeeding bill a refinement over previous proposals and crafted to achieve a fair resolution of the compensation dilemma while being cognizant of the political environment in which such legislation was to be considered.

The most recent version of a legislative framework that we join others in industry in supporting is S. 1265, the Asbestos Workers Recovery Act (AWRA), sponsored by Senator Armstrong and four other Senators, including two other distinguished members of the Finance Committee, Senators Long and Boren. An identical proposal in the House, HR 1626, currently enjoys the broad bi-partisan sponsorship of 65 members of that body, including the Chairman of the House Subcommittee on Labor Standards, Congressman Austin Murphy.

Mr. Chairman, I believe that the overwhelming majority of AWRA sponsors in the House and Senate have lent their good names to this effort because they believe strongly that the entire asbestos compensation issue merits Congress' close attention, and because they believe that AWRA reflects the fundamental principles necessary to insure that a program of this nature is fair and that it works as expected. Manville, too, recognizes that the Asbestos Workers Recovery Act as introduced will undergo substantial refinement in the legislative process, and in fact we would propose a number of changes ourselves at the appropriate time.

While we all may have suggested improvements to offer the Committee as it considers S. 1265, the proposed legislation does reflect certain principles that must be included in any comprehensive solution to the asbestos problem. These elements include:

payment of fair and adequate compensation to those who are disabled by asbestos disease, but not to those who are not;

financing of asbestos compensation benefits by all of the responsible parties. Clearly this criteria envisions substantial industry participation; the fact that the federal government's own actions specially and uniquely contributed to the creation of the problem must also be accounted for in the legislation.

mandatory use of an exclusive, medically-sound system for evaluating asbestos-health claims, as a full substitute for the present, haphazard, tort system.

Each of these major components includes several discrete issues which are important to the overall fabric of a solution.

Payment of Fair Compensation.....

S. 1265 presently contemplates the payment of two, additive, benefits to workers injured by asbestos exposure: the first, or primary, benefit to be paid through existing state and federal workers' compensation systems (all of which provide coverage for asbestos-related disease); and the second, or supplemental benefit, to be paid in lieu of a worker's right to bring a tort lawsuit. At 1984 rates and assuming an average hypothetical case,* S. 1265 would call for total cash payments of about

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*Average hypothetical case: employee earning $27,500/yr. becomes totally and permanently disabled from an asbestos-

$286,800, plus medical expenses. Of this amount, approximately $251,000 is the workers' compensation benefit as calculated under existing law. The remaining $35,000 reflects AWRA's new "supplemental benefit" to be payable in lieu of tort. Supplemental benefits under S. 1265 are expressed as a multiple of State Average Weekly Wage so as to account for the various "needs" factors that are reflected in tort awards. Moreover, since AWRA's supplemental benefits are intended to replace tort damages, the maximum "supplemental benefit" payable is derived from RAND Institute for Civil Justice data reporting the historic net-to-claimant tort payment to asbestos plaintiffs of $35,000. While this benefit amount surely must be examined closely by the Congress, it is important to understand that legislation such as AWRA aids injured workers by providing both certainty of process -- everyone who is medically disabled by asbestos will receive an award -- and promptness of payment. Moreover, a larger total number of claimants will receive some payment than has been the case in the litigation.

....But Only to Those with Proven Disability.
One of the ironies of the existing asbestos tort litigation is that plaintiffs with no current disability often collect substantial damages, to the detriment of the defendants' ability to pay truly injured claimants, both now and in the

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(Footnote Cont'd) related disease at age 52. His wife is age 50 and he has no other dependents. The employee dies at age 62 and his widow dies at age 70.

future. As the Justice Department has observed in its recent *amicus curiae* brief filed with the Fifth Circuit Court of Appeals in the asbestos case of *Jackson v. Johns-Manville*,

> "In the unprecedented circumstance of the mass asbestos litigation......awards that more than compensate for proven injuries impinge on the right of thousands of other present and future plaintiffs to recover for the same wrong.****The primary need to compensate plaintiffs with actual injuries...militates against the award of damages for injuries whose existence remains speculative."

Often, such cases are filed out of understandable concern that the statute of limitations will otherwise extinguish the plaintiff's right to recovery. But at the same time, it must be recognized that there are limits to the resources to be devoted to compensating asbestos victims. Any legislated remedy should incorporate liberal statutes of limitations that, given the size of the asbestos tragedy, reserve compensation only to those with a proven disability, while protecting the rights of workers to file claims in the future in the event they do, in fact, become disabled.

S. 1265 realizes this objective by predicating payment of supplemental benefits upon an affirmative finding before a workers' compensation program. Since workers' compensation programs make payment only in cases of proven disability, presently non-disabled claimants would not be eligible for a supplemental-benefit-in-lieu-of-tort until such time as an actual disability arises. Moreover, using workers' compensation as a base for payment allows the legislation to rectify a significant problem in the tort litigation: how to deal with the development of new injuries subsequent to the filing or resolution of the lawsuit, or with awards of limited dollars to claimants with purely speculative claims that may - or may not - result in future disability. Workers' compensation authorizes automatic re-opening of claims in most states where increased disability, or new disabling conditions, can be shown.

Contribution Within the Means of the Participants to Pay

Obviously, a legislated remedy that imposes an unmanageable financial burden on the participants is counterproductive. A legislated remedy must acknowledge not only what is a fair level of compensation to be paid, but also the finite limits on our collective ability to finance compensatory payments.

S. 1265 accomplishes this objective by placing a ceiling on total assessments to finance supplemental benefits of $300 million per year for each of the first two years. Thereafter, the $300 million annual limitation is removed and the trust fund that pays supplemental benefits would be experience rated. In no event, however, could the government contribution called for in S. 1265 ever exceed $150 million per year.

Mr. Chairman, some have suggested that the $300 million cap during the first two years of program operation is inappropriate. I would point out that that level of expenditure would deliver to asbestos claimants in the first year alone an amount greater than the total, net-to-claimant payments realized during the first ten years of asbestos tort litigation. And that is before accounting for the additional value of workers' compensation benefits that also would be paid as a result of enactment of S. 1265. Viewed in this light, a reasonable, temporary, cap on expenditures is justifiable in order to assure an orderly transition from the tort system to a no-fault compensation system.

I cannot emphasize enough, Mr. Chairman, the need to place sensible financial parameters around a legislated compensation system. In Manville's case, for example, we have recently announced a tentative agreement in principle on the essential elements of a Plan of Reorganization with one of the important constituencies with whom we are negotiating in our Chapter 11 proceedings. Under the terms of that agreement, Manville would be required to pay a large "start-up" sum to satisfy trade and commercial creditors, existing and short-term projected asbestos claims, and any other validated claims, and thereafter to pay up to $75 million per year for as long as a quarter of a century to discharge our obligations to asbestos claimants.

Quite bluntly, that's all there is to be had from us, while still allowing Manville to remain a viable business that can generate earnings to finance compensation payments in the out-years. The multibillion dollar package we have agreed to is reportedly one of the largest payments in satisfaction of tort liabilities in American corporate history. There are also those in the financial community who believe that Manville will be hard pressed to perform under such a Reorganization Plan. The point, Mr. Chairman, is that a legislated remedy that requires Manville to shoulder an even larger burden could not be sustained.

I hasten to add that we do not expect to save any money by promoting enactment of a legislated remedy. To use a phrase with which Finance Committee members are painfully familiar, we expect that over time, asbestos-disease compensation legislation and our tentative Chapter 11 agreement would be "revenue neutral," that is, Manville expects to pay about the same amount in either case through one compensation approach (legislation) _or_ the other (a confirmed Plan of Reorganization). For my company, then, a legislated remedy is not a means by which to reduce its costs. The real utility to asbestos compensation legislation is that it rationalizes the process by which asbestos-health claims are evaluated, assuring that the more seriously injured always receive more than their less seriously injured counterparts; and, it assures present and future claimants that, of the resources commited to pay their claims, the injured parties alone will receive the maximum benefit.

Acknowledgement of ALL Parties Responsible in the Asbestos Tragedy

While vigorously contesting its _legal_ liability as third-party tort litigants, leaders in the asbestos products manufacturing community have long acknowledged their _social_ responsibility to participate in some way in the compensation of persons injured by exposure to their products. And, whether we agree with it or not, the courts have held that we have a legal obligation to do so.

Defendants win a significant percentage of those cases that proceed through trial, but usually only after expenditure of fees for defense that are disproportionate to the real settlement value of the claim. So while the asbestos cases may not always involve cut and dried legal issues or fact situations, the economics of the cases clearly favor settlement. Unfortunately, this dynamic sometimes results in block settlements in which one or two very strong cases are used to leverage larger settlement offers on substantially weaker cases that comprise the bulk of the settlement block. While this may represent good tactics for lawyers and reflect the realities of litigation, it hardly is a rational system for judging occupational disease claims. And again, dollars awarded now to medically unwarranted claims only jeopardize our collective ability to compensate other present and all future claimants. Modern medicine gives us the tools to do better!

Mr. Chairman, Manville and, I believe, the other defendants are prepared to pay our fair share of the cost of compensating workers injured by asbestos. But we also believe that the federal government must also step up to its responsibility in this regard. An analysis of the unique role played by the federal government in creating the asbestos tragedy has been discussed at length in several Congressional hearings. Evidence already available to the Senate shows that:

> by no later than 1939, the Navy was aware that "present occupational conditions" posed a risk of asbestos disease for shipyard workers within government control (See, 1939 Annual Report of the Navy Surgeon General);
>
> the federal government acknowledged that it was "not protecting the men as we should" from overexposure to asbestos in navy shipyards (See, 1941 memorandum from the Navy Director of Preventive Medicine to Admiral McIntyre, Navy Surgeon General and President Roosevelt's personal physician);
>
> the United States controlled the working conditions in all domestic shipyards during World War II (See, 1943 memorandum from the Secretary of the Navy outlining minimum requirements for shipyard health and safety), yet routinely ignored reports from its own health/safety pesonnel warning of "asbestosis hazards" and routinely reporting asbestos dust counts many times in excess of the U.S. Public Health Service standard (See, *e.g.*, 1979 Long Beach Naval Regional Medical Center memorandum by R. P. Hobby estimating asbestos dust exposures from 1943 through 1979);
>
> due to the critical nature of asbestos products to the nation's defense, the federal government entered the asbestos business as an importer and supplier, and further entered into international agreements to control world asbestos markets to its advantage (See, 1943 International Agreement between the United States and Great Britain Apportioning Supplies of African Asbestos Fiber Between Them);
>
> in the first epidemiological study of shipyard exposures to asbestos, undertaken by government agents and published in 1946, the federal government purposely withheld crucial evidence of massive overexposures to asbestos in the course of the World War II effort to revitalize the Allies' naval forces (Compare, 1946 Fleischer-Drinker Report with recently discovered reports of shipyard industrial health surveys from that period in which substantial disease is reported);
>
> Congressional passage of the 1946 Lucas Act confirms that it was Congress' intent that wartime contractors performing mandatory defense orders should not bear any liability that might arise out of fulfilling those critical war material contracts. But for a limited, six-month, statute of

> limitations that effectively barred the filing of long-latent asbestos claims, the federal government today would be -- and should be -- indemnifying asbestos product manufacturers for a substantial portion of their asbestos-related liabilities.

In short, Mr. Chairman, Manville believes that where identical commercial activity is involved, industry and government ought both be held accountable according to identical criteria. And in the asbestos tragedy, unlike many other alleged toxic torts, a history of intimate, direct government involvement in the import and sale of asbestos product, as well as the harmful overexposure of thousands of workers, can be convincingly documented. In these circumstances, we reject the notion that Congress intended for sovereign immunity defenses to shield the government from liability, while similarly situated private sector companies are subjected to attack for what is the government's negligence! Indeed, the U.S. Supreme Court reached the identical conclusion in its 1983 Lockheed decision, holding that claims by an unrelated third party against the United States were not barred by payment of FECA benefits to the real party in interest. In a very recent acknowledgement of potential government responsibility in the asbestos cases per se, U.S. District Court Judge Robert Peckham held that by virtue of exceptional wartime powers, the federal government may have entered into a "special relationship" with asbestos product manufacturers, and that the United States may be liable for any and all of the damages that result.

Clearly, the government's use of sovereign immunity to avoid liability for its own negligent actions is not what Congress intended when it created the Federal Tort Claims Act and the exceptions to it. On the contrary, because asbestos-disease is dose-response related -- and therefore the number of disease cases is a function of the workplace controls utilized at the jobsite -- it seems much fairer to say that industry ought to be responsible for compensating those persons that it may have overexposed and harmed, and similarly government is responsible for compensating those persons it caused to be harmed.

Any other policy interpretation leads to injustice, such as occurred in the case of Shuman v. United States. There, the District Court found the Navy knew of the asbestos risks to which it was exposing shipyard worker Shuman, and the Court explicitly found the Navy negligent. The $145,000 award was overturned on appeal when the First Circuit ruled that while the government may have been negligent, its behavior fell within the "discretionary function" exception to the Federal Tort Claims Act and therefore the claim was not actionable in tort.

In light of the overwhelming evidence of federal government involvement in the creation of the asbestos tragedy, S. 1265 assigns to the government responsibility for financing 50% of the AWRA's costs -- a share which corresponds to the minimum percentage of total present asbestos tort plaintiffs reporting occupational exposure to asbestos from a shipyard. Under the terms of the legislation, the government's cost could never exceed $150 million per year. Moreover, AWRA contains explicit authorization for periodic review of the equities of such a cost split, holding out the opportunity for the percentage of government responsibility to be decreased if the actual claims coming before the Fund do not reflect the historical ratio of shipyard or other government exposures.

Make the Legislated System a Worker's Exclusive Remedy

The essential quid pro quo that must accompany creation of an administrative mechanism for compensating asbestos victims is a full and complete prohibition against continued tort lawsuits for such injuries. Only if the litigation alternative is foreclosed can the resources available to pay compensation be maximized.

As radical an idea as some would have you believe this notion to be, it is in fact increasingly common for the federal government to legislatively limit or replace remedies available under the tort system where that system breaks down. The inequities of individual lawsuits for injuries relating to international civil aviation, for example, have been minimized by the establishment of limits on liability. Similarly, future suits arising from participation in the Space Shuttle program are limited by federal legislation. There are also limitations on liability for damages resulting from nuclear power incidents, on the liability for cleaning up hazardous waste dumps and accidental discharges of oil and hazardous substances, and on the liability for participating in unusually hazardous or nuclear activities on behalf of the Defense Department.

In some cases, total immunity from tort liability for private entities has been granted by the Congress. The most obvious example of this phenomenon is the federally-created Longshoreman and Harbor Workers Compensation Act, wherein the tort liabilities of private shipyard operators was replaced with the new program of Longshore benefits. Suits against Swine Flu vaccine manufacturers for personal injury caused by the vaccine are also barred by federal statute; the exclusive remedy available to a party so injured is to file a claim against the United States under the Federal Tort Claims Act. Similarly, as a result of legislation enacted just last year, any claims for damage stemming from the early atomic weapons testing program must be brought only against the federal government under the Federal Tort Claims Act.

In summary, the Congress has not hesitated to intercede to replace the tort system with a more equitable and efficient alternative where the larger public interest is at stake. Such is the case in the asbestos example, where absent containment of the personal injury claims to a rational system, already limited resources must be further diminished by expenditures for court fees, defense costs, etc.

S. 1265 addresses this issue by making the payment of supplemental benefits under AWRA, together with any applicable underlying workers' compensation benefits, an injured worker's exclusive remedy for asbestos-related injury. The persons afforded protection from suit by Section 3 are all those asbestos defendants who pay assessments to finance supplemental benefits through the Trust Fund and employers making corresponding payments in the underlying workers' compensation claims.

In closing, Mr. Chairman, we are convinced that federal legislation is essential if the asbestos tragedy is to be resolved fairly and completely: the litigation _status quo_ is clearly unacceptable; and neither a Chapter 11 proceeding nor the privately negotiated Wellington Agreement can successfully, uniformly and comprehensively address the full range of issues that must be dealt with in order to bring the tragedy to an honorable close.

The Asbestos Workers Recovery Act represents one very sound approach to how the asbestos issue might be addressed from a public policy perspective, and we fully support its consideration, refinement, and hopefully, enactment.

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Senator **Durenberger**. Mr. McKinney, I'm going to read you some statistics. Tell me how accurate they are.

One is that between the years 1940 and 1980, approximately 27½ million Americans had some exposure to asbestos in the workplace. Is that an approximately correct figure, to the best of your knowledge?

Mr. **McKinney**. I don't know, Mr. Chairman, whether that's accurate or not. I can tell you that every living human being and every breathing mammal has been exposed to asbestos fiber. Unless you have a marvelous filter system in this building, we are breathing it right now because it's been in the Earth's atmosphere since the beginning of time.

Senator **Durenberger**. All right.

Mr. **McKinney**. It's the degree to which they were exposed that counts, and not how many people might have been exposed, because we all have been exposed.

Senator **Durenberger**. All right.

You are familiar with the work of Dr. Irving Selikoff and the people at Mount Sinai.

Mr. **McKinney**. Yes.

Senator **Durenberger**. Their evidence indicates that in 1985, there will be 8,800 asbestos-related deaths. Again, is that a matter of degree of exposure, or can you affirm or contradict that statement?

Mr. **McKinney**. It is very difficult for anyone with scientific precision to question a lot of the predictions which have been made. My own personal belief is that most of the predictions on large numbers of cases—I mean hundreds of thousands of cases, impairments—that number of deaths are exceedingly high.

On the other hand, it may very well turn out that instead of the 50,000-case figure which Mr. Ross referred to, there may be 100,000.

Senator **Durenberger**. They indicate further: "Significant mortality will continue through the year 2030, about 50 years after the time when significant product regulation was imposed on asbestos materials. Total excess deaths will be approximately 350,000. And, in addition, asbestos will be responsible for 200,000 to 300,000 disabilities." What's your view on those figures?

Mr. **McKinney**. I think that's a grossly exaggerated figure.

Senator **Durenberger**. By approximately how much?

Mr. **McKinney**. More than 10 times.

Senator **Durenberger**. More than 10 times?

Mr. **McKinney**. Yes.

Senator **Durenberger**. I ask those questions not to test your memory of your science courses or your memory of scientific expertise in the area, but to try to get you to draw a distinction for the subcommittee between the problems created in the Navy shipyards during the war and the problems that are created by exposure subsequent thereto.

Your testimony seems to zero in on the Government's responsibility during the Second World War. You make reference to the fact that the Navy, the War Department, deliberately refused to comply with public health service standards promulgated in 1938 for asbestos exposure.

What was the situation after 1945 in terms of compliance with public health service standards, the conformity of those standards with what you or your people in your company know to be the best scientific knowledge about asbestos problems?

Mr. McKinney. There has been evidence that even up into the 1970's in some shipyards that there was very little attempt made to comply with even the more recent OSHA standards.

I can't, of course, say that if there had been compliance with the 1938 standard that it would have greatly reduced the problem. The fact of the matter is that at that time medically I don't think they knew what they were trying to measure. That standard was in terms of dust particles which generally are visible. The thing that did the harm were individual fibers that are impossible to see even with a light microscope. And at that time, they weren't counting the right things.

There is a tremendous amount about this which looked at in today's terms and everything looks obvious in hindsight. As a past patent attorney, I can tell you that's true. You look at things in the past, you say why wasn't it obvious to them to do this or that. Well, there were a lot of things that were not obvious to the medical profession that should be done with respect to this.

However, in the shipyards during World War II and the Korean war and possibly during the Vietnam war, there was no attempt made to comply in many instances with what the standards were at that time. I've never said that that's reprehensible conduct. All I've ever said is that I don't think that industry should have to pay the bill for that conduct.

Senator Durenberger. The Manville Co., has been sort of synonymous with asbestos in construction, has it not, over the years?

Mr. McKinney. For many years, Manville was the free world's largest producer of asbestos fiber, and a large producer of asbestos-containing products.

Senator Durenberger. Would it be appropriate for the record of this hearing to show the degree to which Manville also, say back into perhaps the last century, has been a leader in warning people about some of the dangers inherent in asbestos?

Mr. McKinney. Well, despite some of the things which were printed, it was very generally known in the early 1930's that there was a disease associated with the use of asbestos fiber. That generally was considered to be restricted to the plants in which people were using pure asbestos fiber and fabricating it into products.

Senator Durenberger. That's pulmonary asbestosis?

Mr. McKinney. Yes.

And there were studies done, and the studies were published, and there were many medical articles written about it at that time. And there are indications that the knowledge was fairly widely known.

There was another problem back in that time which our company was involved with, which was a disease called silicosis, which came from exposure to products that we made that were very dusty by their nature. They were like talcum powder in consistency and were almost pure silicon, and the breathing of those particles could cause silicosis.

The company developed what were—even by today's standards and by the standards then maybe perhaps—crude dust collection systems, but the reduction of the dust eliminated that problem. And this may have misled everybody to believe that that was the solution in the asbestos area. Remove the visible dust, and you would remove the problem.

That turned out not to be so for asbestos. It certainly was so for silicosis. And we did constantly over the years work on dust collection systems. And, in fact, that's some of the work that I personally did as a patent attorney for the company; was to work with new dust collection and dust suppression systems.

Senator **DURENBERGER**. The evidence of mesothelioma and lung cancers began to appear approximately when in time?

Mr. **MCKINNEY**. The definite data about it was in the 1960's.

Senator **DURENBERGER**. Thank you.

Senator Armstrong.

Senator **ARMSTRONG**. Thank you, Mr. Chairman.

I want to come back, Mr. McKinney, to the question of whether or not this is a bailout. And I congratulate you on your statement, and thank you for meeting that issue head on, because, believe me, if this committee gets serious about legislation on this topic, that is the issue we are going to have to confront, and there won't be any escaping it. If this is a bailout or if it's seen as a bailout, this bill or something like it hasn't got any chance whatsoever, in my opinion. So I think you were wise to meet that issue head on.

I'd like to pursue the exact nature of Manville's interest in passage of legislation. As I understand it, your company is a long way through the chapter 11 process, and as a part of the agreement, you have, in effect, committed to pay virtually all of the present existing profits of your operations to a fund which would be used for paying claimants. That is, people who are victims of this disease. Is that correct?

Mr. **MCKINNEY**. That's correct.

Senator **ARMSTRONG**. What proportion of the existing profits of the Manville Corp. have you already agreed to dedicate to that purpose?

Mr. **MCKINNEY**. In the reorganization plan, the funding is done in stages. Of course, our agreement is, first, to put up, I believe, $200 million in cash, and the insurance proceeds, which, by sum, are expected to be about $615 million. After that, we have committed $75 million a year for a period of over 15 years.

Senator **ARMSTRONG**. $75 million a year?

Mr. **MCKINNEY**. Yes.

Senator **ARMSTRONG**. What are the present profits of the Manville Corp.

Mr. **MCKINNEY**. Our profits? Well, our profits are not $75 million a year.

Senator **ARMSTRONG**. Well, that's the point that I wanted to get to. If I understand the plan—I have not studied it in detail, but I've read a summary of the tentative agreement—what you have really done is to, in effect, say that you are going to operate the company for a prolonged period of time chiefly for the benefit of those who prove their claim of injury as a result of this disease.

Mr. McKINNEY. Yes. In addition to that, we have agreed to give the settlement vehicle 50 percent of the common stock of the company, with the possibility of getting 30 percent more. In addition to that, to the $75 million, if needed, we have committed to giving 25 percent of our net earnings after taxes each year for as long as it takes to pay the claims.

All of this funding is on a contingent basis. That is, the contingency being that it is needed to pay off valid claims. So what we have, in effect, done is tried to accommodate the widely varying estimates of how many claims there are going to be, which was referred to by the chairman. And so we have done this in such a way that if there are that many claims, we have committed virtually all the resources of the company in order to do that. Many people have questioned and the press, as you have read, that that may have been a very foolish thing for us to do because if we are in error on some of our projections as to the cash that we can generate, it will be a very tight schedule to stick to.

Senator ARMSTRONG. Well, I don't think, Mr. Chairman, that the action of the Manville Corp. makes this a good bill, but it does say something about the credibility of the testimony which Mr. McKinney brings to us. Because if I understand the situation, his company has, to all intents and purposes, set the stage at least for resolving their legal obligation to the claimants. Right or wrong, his company is going to pay everything they can toward this whether the legislation passes or not.

Am I correct on that, Mr. McKinney?

Mr. McKINNEY. That's correct.

Senator ARMSTRONG. So that your interest here today—maybe I shouldn't lead you quite this way. Let me rephrase what I was about to say. If that's the case, if you have got your problem solved through this process, however painful, what do you care whether or not we pass legislation of the type that's under consideration?

Mr. McKINNEY. The primary problem is that a solution for us is not a solution for the rest of the industry. The other part of it is—and I've been at this now for 10 years. It seems to me that it is not equal justice under the law when—for similar—and let's assume that all of the misdeeds attributed to industry are so. You can, based on just the outline I have given you, recite similar or perhaps even greater misdeeds on the part of the Government. And it seems grossly unjust that industry has to pay for the misdeeds of the Government. And that's the way the system is today.

I should have said perhaps this isn't understood. Half of the suits at least that have been filed against industry were filed by shipyard workers. And, basically, those suits were filed over actions which were purely Government actions in that the Government controlled the work practices, they controlled the work place, they specified what material was to be used. And, in fact, we were committed by law to take asbestos fiber that they gave us and make it into products they told us to and supply it to the shipyards. There is evidence that they knew they were overexposing people, and at the end of the war, they, nevertheless published a study which said that insulation work in the shipyards was not a hazardous occupation.

But 10 years ago it occurred to me—and I was at that time the chief legal officer of the company, and we had gone through some litigation. And it occurred to me that the tort litigation system was a fruitless exercise; that the attempt to say who was at fault was a fruitless exercise; that the object should be to compensate anyone who has an asbestos-related disease because—and I can't go into all the evidence about it, but the medical profession was at fault, the unions were at fault, the workers themselves, just like those of us who won't wear seatbelts, were at fault. And the Government was at fault, industry was at fault. And if you say to yourself let's have a system in which the responsible parties who can pay make the payment, and by and large they pay for their own contributions, what do you end up with? The workers can't pay. The unions can't pay. The medical profession can't pay. So it comes down to industry and Government. And that's why for 10 years we have been on this theme.

The fair thing is that each person pay for their own actions. And that's why I personally have always thought that it is not a just solution and it is not a fair solution unless the Government contributes to it.

Senator ARMSTRONG. Mr. Chairman, the time is running so I'm not going to pursue this further today, but I hope at some appropriate time some appropriate committee of the Senate, probably the Judiciary Committee, will take a look at the broader issue which has been raised by Mr. McKinney and others. He has pointed out that his background is in the law, and yet today and on other occasions he has been very, very critical of how the legal system is operating to protect the interest of people who have a legitimate claim. And I hear that same complaint from a lot of people, both in and out of the legal profession who are not involved in asbestos, but have other kinds of business before the courts; that the system is simply breaking down. That it's not fulfilling its function in our society. And I think we ought to do something about it.

I certainly don't have anything to propose about that this morning, you will be relieved to know, but I hope that at some time we will.

And I thank you for your contribution.

Senator DURENBERGER. Mr. McKinney, I want to ask just two questions. One, on the issue of the Government's liability, pertaining to your testimony in particular, when you say the Government has some liability and some responsibility, I can look at it two ways. One, the Government, that is, the War Department, the Navy, whoever it is that, in effect, ordered your company to process certain kinds of asbestos fibers, which now are the basis for about 50 percent of the claims. Or I can look at it as we see it often in the environmental area and the occupational, safety and health area. The Government refusing to act in the face of clear and significant warnings that it needs to act on behalf of a certain set of individuals or on behalf of society as a whole.

Which of those two accusations do you make against your Government?

Mr. McKINNEY. I simply think that there were things done by the Government in respect to asbestos fiber for good and valid reasons, which were life-saving reasons, but they did these things which overexposed workers, particularly in the naval and maritime shipyards so that those people got diseases. I do not say that those actions were wrong. All of that had to do with saving lives in the end, if you take it on the whole. And most of the lives in danger were in danger immediately. There was not this prospect that 30 years out they may get a disease. So the actions of the Government are perfectly understandable.

As a matter of fact, I don't know if anybody in the room but myself is old enough to remember, but there was a ship burned up off the New Jersey coast in the 1930's called the *Morrow Castle*. A lot of people died on that ship when it burned up. We were asked after that by the Maritime Commission if we could develop a fireproof bulkhead for ships, which we did. And the only one that we could make contained asbestos fiber. And that became the standard bulkhead used in ships and saved innumerable lives. The asbestos products that were used in the ships during the war—the most dangerous thing on board ship is fire. And this was the focus of the Government.

Also, those of us who lived through that time remember that the great focus was on productivity. You didn't want to do anything that would endanger high productivity. So I understand why the Government did those things. And I don't say that what they did was wrong. And in retrospect, since it contributed to the winning of the war, I'm very glad that they did it.

But I don't like a legal system which ends up—which is maintained by the Government, the legal system, and the legal system says that industry should pay for the consequences of those acts.

So I cannot make the statement that what the Government did was wrong. I just simply come back to say we should not have to pay the bill for the consequences of their actions.

Senator DURENBERGER. The second question: This subcommittee has developed a fair amount of concern over the issues of medical malpractice, professional liability problems. So there is some familiarity with the role that the insurance industry has played in professional or not played in the area of professional liability, what has been the role of Manville's insurers over the last 10 or 15 years in these various asbestos cases? And which of the insurers, product liability insurers, errors and omissions, liability insurers—generally, what role have they played on your behalf?

Mr. MCKINNEY. If you go back to the 1930's, the insurance companies participated with us, the predecessor of Raymark and with then Johns-Manville in conducting studies to determine what was a safe level of exposure to asbestos, because you must remember that the vast majority of people exposed to the dust levels of that time never got any disease. So the inquiry was to try to find out and so on.

And over the years our insurance carriers worked with us in helping us to take dust counts and so on in the plants, recommending to us methods of reducing that and so on.

Then when the litigation broke out, of course——

Senator DURENBERGER. And that's when in time?

Mr. MCKINNEY. Oh, the first cases were in the late 1960's and came about because of a quirk in the Federal workers' compensation scheme which caused awards to many workers to be wholly inadequate because of the number of years since they had worked in the shipyards.

At that time, of course, our insurance carriers had the responsibility for defending those cases. And they defended the original cases and somewhat rather on a routine basis, because I don't think anybody at that time—I wasn't personally involved, but I don't think anybody at that time recognized the magnitude of the problem that was coming. Had not seen that much severe disease at that time. They didn't know the numbers of cases that even were going to get into suits very quickly.

Senator DURENBERGER. Wasn't it in that period of time that Selikoff and those people were very active in connecting asbestos fibers with various kinds of cancers? Wasn't that in the 1967–70 time period?

Mr. MCKINNEY. Before 1964, Dr. Selikoff had been following a so-called cohort of insulation workers. And among these workers he had found an excess of asbestos-related disease. And I think the particularly surprising finding at that time was a large excess of lung cancer. And, of course, his raw data showed then, as it was showing 12 years later, that there were no cases of lung cancer unless somebody smoked tobacco in some form.

There were a lot of issues like that that I think perhaps took everybody's eye off the ball. Everyone was still trying to pinpoint causes and fault and all of that in saying, look, we've got a major problem on our hands; that if you are really honest about it, it was wholy unexpected in the magnitude that has come about, and let's get at compensating.

Senator DURENBERGER. But back on the insurance role, the point here is that despite what Dr. Selikoff was doing, your insurer treated this as a rather routine matter.

Mr. MCKINNEY. Only had a handful of cases. Only had a handful. I think when the first case was tried, we had maybe half a dozen lawsuits that had been filed at that time.

When the cases started hitting the kind of numbers that Mr. Ross referred to, several hundred a month, our insurance carriers looked at the possible liabilities they would have to pay off. And then, of course, they started questioning whether or not they really were liable for that insurance coverage. And so there was a great deal of litigation on whether or not the insurance supplied at the time the person was exposed or whether it was at the time it was manifested. And this led into the big insurance litigation, which is still going on and which is being conducted in an auditorium because there are so many people involved. They have to have that large a place.

So for some years our insurance carriers did not reimburse us on a current basis. And this prevented us from being able to settle cases.

I talked about the number of cases we've litigated. We settled about 4,000 cases.

Senator DURENBERGER. Who made those decisions? Was that then being made by the company itself?

Mr. MCKINNEY. Made by the company jointly with the insurance carriers. We, obviously, had to have their approval to make settlements. But when they were reimbursing us on a current basis and agreeing to settlements, we made a lot of settlements even though it bothered many of us that we knew we were paying some people with no disease and paying other people with disease less than they probably would have been entitled to.

But the number of cases has now become so large that as someone expressed to me, it's the biggest hit the insurance industry has ever taken—the asbestos litigation. It is going to have a far-reaching effect on insurance matters for all of us. Many people, particularly small companies today, are unable to get product liability insurance, particularly, entrepreneuers who are trying to launch a new product, the medical consequences of which may not be precisely known. There is no way that they will get insurance coverage for doing it.

But it's now spilling over into other areas.

Senator DURENBERGER. Well, Mr. McKinney, that's obviously a concern to all of us. As I recall your testimony, I will submit some questions to you in writing.

At the point when your insurer began to realize that this mountain was building in its reserves, it switched off protecting you to protecting itself. Is that correct?

Mr. McKINNEY. Yes.

Senator DURENBERGER. And that occurred at about what time? What year, approximately?

Mr. McKINNEY. I don't know exactly when it began for all of them, but the severe effect on us came in 1982, a few months prior to us filing in the chapter 11, and was one of the reasons for it.

Senator DURENBERGER. That was the point at which they quit paying settlements?

Mr. McKINNEY. Yes. There was one carrier that was reimbursing us on a current basis, but all tolled, I think there were 26 carriers involved in that.

Senator DURENBERGER. But your testimony indicates that it had been a practice of Manville or by Manville's carriers to work with the company over many, many years with regard to the potential problems involved in asbestos.

Mr. McKINNEY. Yes.

Senator DURENBERGER. All right. Thank you very much, Mr. McKinney.

Mr. McKINNEY. Thank you.

Senator DURENBERGER. Our next witness is Mr. Edward J. Carlough, the general president of the Sheet Metal Workers' International Association.

Mr. Carlough, come on up.

While you are coming up, let me say to you, again, as I have to the others, that your full statement will be made part of the record. We may ask you to answer some additional questions that time doesn't permit us to ask during the course of this hearing. You may now proceed to summarize your testimony in 5 minutes.

STATEMENT OF EDWARD J. CARLOUGH, PRESIDENT, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO

Mr. CARLOUGH. I want to thank the chairman for the opportunity to appear here this morning. Our union represents members past, present, and future who are faced with this problem.

We've heard a lot of talk this morning about this shipyard problem. It's not just related to shipyards, although our members who have worked on shipyards have contacted asbestosis, and in some cases mesothelioma downstream. We also have members who work in the railroad part of our industry. One of those members have received a judgment from a Federal jury in July in Baltimore in the amount of one-half million dollars as a settlement for his contraction of the disease. And we have great numbers of members not only in our union but in other unions in the entire construction industry who are afflicted with the plague.

From 1958 until 1972, for a period of 14 years, there was an industry practice of spraying asbestos onto construction sites. Since the latency period for asbestosis and related disease can be 25, 30, 35, 40 years, the jury is not yet in on the verdict for those members and the extent of their affliction.

Two years ago, we had a private medical study conducted among our members of local 17 in Boston, MA, conducted by the Harvard Medical School. The results were shocking. Virtually none of these members were shipyard workers; virtually none of them were railroad employees. Sixty-one percent of our members in the Boston test conducted by the Harvard Medical School showed abnormalities in their lungs.

This spring, we conducted a similar test in conjunction with medical authorities in Beaumont, TX. And the results were even worse.

As a result, we had Dr. Irving Selikoff from Mount Sinai School of Medicine meet with our general executive counsel 2½ weeks ago. Subsequently, he met with the 400 business representatives from around the United States and Canada. And as a result of that, we have contracted with Dr. Selikoff to conduct a clinical study among our construction members nationwide, and, indeed, in the Dominion of Canada to see precisely how bad the problem is among our members.

Mr. Chairman, I say this in all respect to the sponsors. We are totally opposed to S. 1265 for a punchlist that I had of a minimum of 21 reasons. I will recite just a few here because of the time limitations imposed upon the witnesses.

The benefit payments are totally inadequate. They are based on manufacturing workers and for manufacturing workers they are grossly inadequate. For construction workers, they are even more inadequate. There is no payment of medical expenses. There is a 5-year limitation on payments. Regrettably, our members can't get better after a 5-year period of time. I wish they could.

And we've heard about lawyers, law suits, torts as not a proper remedy. If we didn't have the litigation over this issue in this country, over the past 10 years and especially the settlements of the past 5 years, I doubt if this legislation would now be pending before the Senate and the companion bill pending before the House of Representatives.

And there is the question of due process. This is a 1-day hearing. Dr. Selikoff is not present. Dr. Selikoff, incidentally, would like to be present to give his expert medical advice to the members of the committee. I believe the members of the committee would want to hear it.

Today, Dr. Selikoff is in Houston, TX, at the request of the International Association of Fire Fighters addressing their convention on the whole question of how asbestosis is affecting firefighters. He should be given the opportunity to be heard.

At our San Francisco convention a week ago Thursday, we had some 400 business representatives present in a meeting room. And I asked them how many among us—none of them are now working at the trade—how many among us at one time or another in our life as sheet metal workers ripped out an existing system in a building which exposed us to asbestos. How many did not rip out an existing system? There wasn't a hand that went up, including my own. We have all done this work.

There is what Dr. Selikoff calls the 20-year rule. The problem doesn't even begin to show up in a membership until they have worked at least 20 years in the industry. Their exposure may have been minimal at some point, but it takes a minimum of that time before the tests even show up.

That's why when we are testing our membership, we are going to test 3,000 clinically throughout the country, selected by the good doctor, selected at random so it's an objective medical determination of the extent of the problem in our part of the industry. We are going to test members who have been—a large part of the tests will be members who have been in the union for at least a 20-year period of time.

And then there is mesothelioma. The question was addressed earlier to Chairman McKinney about what time did mesothelioma come into the industry. Well, I'll tell you when it wasn't here. Mount Sinai has a 1,200-bed hospital, and Dr. Selikoff is certainly one of the world's recognized authorities to the whole problem. They had three cases brought to their attention as recently as 10 years ago. What the problem is downstream in mesothelioma, only God knows.

S. 1265 is an inadequate response to these kind of problems. We believe that this committee, that the Senate, can do much better. And we very respectfully urge you to do much better.

That concludes my testimony. We have submitted a written testimony for the committee. Since the record is open, I will submit a much flushed out punchlist of 22 additional objections that our organization has found for the bill.

[The prepared written statement of Mr. Carlough and the additional information follow:]

TESTIMONY OF

EDWARD J. CARLOUGH, PRESIDENT

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO

BEFORE THE SUBCOMMITTEE ON HEALTH, SENATE FINANCE COMMITTEE

SEPTEMBER 9, 1985

Thank you, Mr. Chairman, for the opportunity to appear before the Subcommittee today. My name is Edward J. Carlough and I am President of the Sheet Metal Workers International Association.

I am appearing today on behalf of 150,000 working men and women in the unionized sheet metal industry. We are deeply concerned about the issue of asbestos and the diseases that result from contact with it. Most of the members of our union work in three environments which are at great risk from asbestos exposure: construction sites, shipyards and railroads.

To give you an idea of what that means on a practical level, we are involved in heating and air conditioning work, insulating, energy retrofitting, duct work, and demolition. In each of these areas, our members have frequent contact with asbestos. But, as I'm sure you are aware, it does not take extended contact with asbestos to cause severe long-term damage. There are examples of workers on summer construction jobs who die from even their limited exposure to asbestos.

Thousands of members of our union suffer from asbestos-related disease today. Many more are walking around with asbestos-related disease and don't even know it. And there are still more who will be afflicted in the future.

Our union has attempted to respond to this crisis by testing members in our local unions to determine the extent of the problem. Based on limited testing in Boston and Beaumont, Texas, we have found alarming results. So we have recently undertaken a major program with Dr. Irving Selikoff to test our members and attempt to provide each of them with adequate protection.

Quite apart from detecting asbestosis, mesothelioma and the other diseases resulting from asbestos, however, is the problem of compensating the victims of these diseases for their suffering. And it is that question we are to address today.

Mr. Chairman, I am opposed to the bill currently being considered to deal with compensation of the victims of asbestos-related disease, S. 1265. Opposed in concept and in specifics.

While I commend the attempt to arrive at a solution that will allow suffering workers and their families to gain compensation for occupational disease, I am strongly opposed to taking away those same workers' fundamental right to sue the manufacturers. The tort system is far from perfect. But it recognizes that different types of cases must be treated differently -- which S. 1265 does not.

In principle, I find it difficult to swallow that the asbestos manufacturing industry -- which perpetrated on the American people the corporate crime of the century -- will suddenly be absolved of its liability through this inadequate compensation scheme.

There is no question that Johns-Manville and much of the asbestos industry knew fifty years ago of the dangers of asbestos. It is morally reprehensible that they refused to tell their workers and the general public about it. Beyond that, they engaged in a vicious coverup so that others would remain ignorant of the hazards of asbestos. It is not my purpose to elaborate on that coverup. For those who are interested in reading more about the sordid history of the asbestos industry, I would recommend the excellent four-part series in the New Yorker magazine, which ran beginning June 10, 1985.

This coverup -- and its moral implications -- are at the heart of the real issue involved with S. 1265. This bill seeks to establish -- as the only form of compensation -- a no-fault payment system similar to a workers' compensation system. But the fault of the industry has already been proven, making the asbestosis victim fundamentally different from a typical workers' compensation claimant.

If a worker loses the use of a finger while performing his job at a lathe, he is eligible for workers' compensation. Although a lathe can be a dangerous piece of machinery, unless the lathe in question is faulty, the accident is not considered to be the fault of the manufacturer.

But with asbestos, we have an entirely different matter. The industry knew -- certainly by 1929 -- of the inherent danger to workers involved with asbestos. Its negligence in informing workers of their risk has been proven over and over in court. How in good conscience can the Congress -- despite proven negligence by the industry -- abridge workers' right to sue the manufacturers and seek justice?

If a compensation system is to be set up, it should be set up in addition to the tort system, not instead of it.

The compensation scheme proposed in this bill is by itself totally inadequate. It would only allow an asbestosis victim to be paid his average weekly wage once a month. At most, this payment would last for a period of five years. If the average weekly wage were $300, for example, that victim would receive only $18,000 over the five year period.

This system seems to attempt to provide workers with compensation equal to the average settlement in asbestos cases up to this point. But there are many cases that are not average or usual. They are exceptional and reveal people and families with extreme problems.

According to Manville's own records, nearly 20 percent of the 4,130 claims settled prior to the chapter 11 filing received $25,000 or more in court. Two and a half percent received more than $100,000. To me, that indicates that the circumstances surrounding those victims and their families warrant individual settlements.

My question is this: If the juries of those victims' peers determined that they should justly receive large sums of money for their suffering, who now has the right to set the limit at $18,000?

It is impossible to put a price on human life. But it is not impossible to see the needs of a victim's survivors. How can we honestly say to a family of five that has just lost its husband and father that $18,000 is all he was worth and that there is no further recourse for additional compensation?

It is also frankly not clear to me why in this legislation asbestos is singled out from all the rest of the dangerous substances to which workers are exposed. The threat of occupational disease is a pressing public policy problem. And it is one that deserves the attention of the Congress. But the problem does not stop with asbestos alone.

There are at least 11 million workers exposed to some 2,400 known or suspected cancer-causing substances or processes.

Two million workers are exposed to benzene with an increased risk of leukemia five times greater than normal.

One million five hundred thousand workers are exposed to arsenic with an increased risk of lung cancer 2 to 5 times greater than normal.

One million five hundred thousand workers are exposed to chromium with an increased risk of cancer 5 to 9 times greater than normal.

One million four hundred thousand workers are exposed to nickel with an increased risk of cancer 5 to 10 times greater than normal.

The list goes on. But the point is this: If it is truly the purpose of the Congress to develop a system that helps protect working people and their families, why take a piecemeal approach? If an asbestos trust fund is set up today, will one be set up tomorrow for benzene? Arsenic? Chromium? Nickel?

Rather than treat the asbestos industry different because it is the most publicized, the Congress should be spend its energy creating a system that will deal with all occupational disease.

Finally, I have a question about why these hearings are even being held in light of the new agreement reached by Manville in the bankruptcy court. It is my understanding that that agreement has the same purpose as this legislation. Although the plan has not yet been adopted, it has been agreed to by two of the principal parties involved in the settlement. In my judgment, it would be unwise for the government to intervene at this point when the parties appear so close to settlement.

Respiratory Illness in the Construction Trades

I. The Significance of Asbestos-Associated Pleural Disease among Sheet Metal Workers

Edward L. Baker, M.D., M.P.H.; Timothy Dagg, M.S.; and Reginald E. Greene, M.D.

To assess the rate of roentgenographic and lung function abnormalities in asbestos-exposed construction workers, the authors studied 314 white male members of a local sheet metal workers union. Health outcomes were assessed by questionnaire, simple spirometry, and chest roentgenography; data were collected and interpreted following guidelines of the American Thoracic Society and the International Labor Office. Analyses of union records showed the tested population to be representative of all those eligible for testing. Pleural abnormalities were common, increasing to a prevalence of approximately 70% in workers with more than 30 years employment. Roentgenographic evidence of pleural disease was significantly correlated with decreased forced vital capacity (p = 0.027) after controlling for the potential confounding effects of age, height, cigarette consumption history, and employment duration. In contrast, forced expiratory volume in 1s showed a stronger association with amount smoked (p = 0.022) than with pleural abnormality (p = 0.316). Logistic regression analyses showed that cigarettes act to increase the effect of asbestos in causing pleural disease among exposed workers. Cigarettes, in the absence of significant asbestos exposure, do not appear to cause pleural disease. The authors conclude that construction workers, such as those described herein, have a considerably increased rate of pleural disease, which has functional significance in view of the correlations noted with forced vital capacity measurements. Therefore, pleural disease in asbestos-exposed workers is not only an indicator of exposure but also an indicator of early impairment of pulmonary function.

Many studies of the pulmonary effects of inhaling asbestos fibers have demonstrated significant impairment of pulmonary function in individuals with roentgenographic evidence of interstitial fibrosis. In many individuals exposed to asbestos, pleural disease is noted also and is characterized by bilateral fibrotic plaques or diffuse thickening along the chest walls and diaphragm. In population surveys, pleural disease is observed more commonly than parenchymal lung disease (i.e., pulmonary asbestosis). Despite the relatively high frequency of pleural disease, the significance of this manifestation of asbestos exposure is debated. Recent epidemiologic studies have evaluated the effects of asbestos inhalation among workers whose exposures to asbestos were less than those of insulation and asbestos manufacturing workers. Often, pleural abnormalities, without parenchymal disease, were identified in workers exposed to relatively low levels of asbestos.

The largest group of asbestos-exposed workers in the United States are construction workers. Recent estimates indicate that 7,500,000 construction workers have received significant asbestos exposure in the past. Workers in these trades are exposed to asbestos directly, through their own work activities, and indirectly by inhaling airborne asbestos fibers generated by others working nearby on construction sites. The extent of asbestos-related disease in Swedish construction workers has been evaluated and pleural changes were reported in 62% of those without radiological evidence of pulmonary fibrosis. In other occupational settings, the presence of pleural plaques in asbestos-exposed workers has correlated well with the duration and intensity of exposure to asbestos.

Asbestos-induced pleural plaques usually do not interfere with lung function directly. Moreover, progression of

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diffuse pleural thickening or pleural plaques to mesothelioma has not been clearly documented and therefore asbestos-related pleural disease is not regarded as a premalignant lesion. However, the risk of developing bronchial carcinoma and mesothelioma is higher among asbestos-exposed workers with pleural disease than among controls with no evidence of pleural abnormalities. Workers with pleural disease also have a higher frequency of chronic bronchitis and an increased lung closing volume. As such, pleural abnormalities may serve both as an indicator of asbestos exposure and as a marker for increased risk of developing pulmonary malignancy or nonmalignant pulmonary disease.

The interaction of cigarette smoking and asbestos exposure in the development of lung cancer is significant and well documented. Less certain is the relationship of smoking and asbestos in the development of pleural abnormalities. Smoking does not cause pleural disease in the absence of asbestos exposure. Two studies of asbestos-exposed workers have concluded that smoking is significantly associated with an increase in the prevalence of pleural plaques and pleural fibrosis, while a third found no such association. It has been hypothesized that smoking facilitates the initial formation of pleural abnormalities. In addition, individuals with diffuse pleural fibrosis have been noted to have smoked a greater amount than workers with hyaline and/or calcified plaques, the latter group having smoking histories comparable with those of workers with normal x-ray films. One report suggests that cigarette smoking may be more important than asbestos exposure in the development of pleural disease.

The current study was performed to evaluate the prevalence of pleural and parenchymal abnormalities in a group of asbestos-exposed construction workers from the sheet metal trade. The relationship of cigarette smoking and asbestos exposure to the presence of pleural disease was explored. In addition, pulmonary function was compared between sheet metal workers with and without pleural disease.

Subjects and Methods

Subjects — In January and May, 1981, Local No. 17 of the Sheet Metal Worker's International Association sponsored medical evaluations for its members. All active and retired union members belonging to the union Health and Welfare Plan (N = 1,413) were notified of the screening by mail and encouraged to participate. Due to scheduling constraints, examinations were limited to the first 314 workers to make appointments.

Characterization of Exposure to Asbestos — Sheet metal workers in the building trades fabricate and install metal ducts for purposes of ventilating commercial and residential buildings. Asbestos was often used in the past to insulate these ducts. During their installation, workers manually removed asbestos fireproofing sprayed onto the steel girders where the ducts were being hung. In addition, sheet metal workers were often in areas where asbestos was disseminated into the general work environment from adjacent activities. In the past, sheet metal workers have also been exposed to asbestos during the installation and removal of boilers and while performing smoke breaching.

Environmental sampling results indicate that sheet metal workers have been exposed to variable concentrations of asbestos. In one study, sheet metal workers received exposures ranging from 0.1 to 0.2 fibers/ml when applying asbestos paper. Where asbestos exposure resulted from adjacent activities (e.g., spraying of insulation materials), personal air sampling recorded levels as high as 1.61 fibers/ml for sheet metal workers, compared with 80 fibers/ml in the spray operator's breathing zone. Mean fiber concentrations of 8.9 fibers/ml were recorded in areas where workers were tearing out old materials to reinsulate with new products. Since direct exposure measurement was not performed in this study, years of employment as a sheet metal worker was used as the exposure variable, including time spent as an apprentice in the trade and any employment while a member of another construction union where similar levels of exposure to asbestos likely occurred.

Assessment of Health Effects — All participants completed a modified American Thoracic Society questionnaire and occupational history developed specifically for this study. Pulmonary function tests were recorded on a Collins' Stead-Wells survey spirometer while the subjects were seated. Nose clips were not employed. A minimum of five trials was required and acceptability was judged by the criteria set forth by the American Thoracic Society. Utilizing the equations of Knudsen et al., percent predicted forced vital capacity (%FVC) and forced expiratory volume in 1 s (%FEV_1) were calculated using the largest acceptable measurement of FVC and FEV_1. As specified in the American Thoracic Society guidelines, the FVC and FEV_1 value may come from different trials. For the analysis, a participant was considered to have abnormal pulmonary function test results if his %FVC or %FEV_1 was below 80% of the predicted value. All films (posteroanterior projection only) were interpreted by a certified "B" reader (R.E.G.) who used the *ILO/UC 1971 Classification of Radiographs of Pneumoconioses* and who had no knowledge of the clinical status or exposure history of the individuals.

A worker was considered to have evidence of a pleural abnormality if he met one or more of the following three roentgenographic conditions:

1. Bilateral pleural thickening of the chest walls and/or diaphragm of extent 1, 2, or 3 (circumscribed or, rarely, diffuse).
2. Bilateral pleural calcification of the chest walls and/or diaphragm of extent 1 or 2.
3. Bilateral pleural plaques (uncalcified).

Workers with parenchymal opacities were also characterized as having roentgenographic abnormalities, while individuals with unilateral pleural thickening, calcification, or plaques only were classified as having normal x-ray films.

Characterization of Smoking History — Individuals were classified as having never smoked ("nonsmokers") if they had smoked less than 20 packs of cigarettes in a lifetime. We classified the remaining workers as "current smokers" if they had smoked cigarettes during the month preceding their physical examination. Therefore, "ex-smokers" consisted of individuals smoking more than 20 packs in a lifetime and stopping more than one month prior to medical testing. The average number of packs smoked per day was also calculated.

Statistics — Student's *t* test and one- and three-way analyses of variance were used to compare mean demographic and pulmonary function values. Chi-square statistics were calculated to test the significance of overall differences among prevalence rates when the latter were stratified by one variable. In the event that significant differences were identified, prevalence rates were partitioned into two groups for intergroup and intragroup χ^2 analyses. The hypothesis that pleural disease prevalence rates increased monotonically with length of employment was tested using an analysis for linear trend in proportions. The Mantel extension test was used to investigate the overall association between exposure (length of employment) and effect (prevalence of pleural disease) while stratifying to control for smoking. Logistic regression analyses yielded odds ratios and 95% confidence intervals (CI) for the effects of smoking and length of employment (independent covariates) on the presence of pleural disease (dichotomous dependent variable).

All analysis of variance calculations were generated by the General Linear Model procedure in the Statistical Analysis System program package (SAS GLM). Logistic regression models were tested using the LOGIST procedure developed by the Duke Medical Center. The Mantel extension tests and analyses of linear trends were generated using programs specifically designed for the Hewlett-Packard 67.

Results

Population Characteristics — There were 1,413 union members eligible for our evaluations, 314 of whom participated. Induction dates into the union were available for 312 (99.4%) of the study subjects and 1,087 (98.9%) of the eligible nonparticipants. To determine whether those evaluated were representative of the entire union membership, all eligible union members were categorized by years since joining the local union and compared with the study subjects. The distribution of local union tenure was similar for those screened and for the overall union membership (Table 1). Furthermore, the mean age of 47 years in the study participants was similar to that of the entire union membership (48 years). Thus, the workers who were examined in the study appeared to be representative of all potential participants.

A significant number of individuals had been employed as sheet metal workers prior to joining Union Local No. 17 in Boston. Therefore, our questionnaire obtained information on the total duration of employment as a sheet metal worker and this variable was used to estimate cumulative asbestos exposure. Since this information was unavailable for union members not participating in our survey, comparability of the participants and nonparticipants could be assessed only by comparing tenure in the local union (Table 1).

Table 1 — Population Composition of Eligible Union Members and Study Members (Alone) According to Years Since Initiation in Local Union

Years Since Initiation	No. (%) Eligible for Study	No. (%) Screened
1-10	382 (27.3)	78 (25.0)
11-20	393 (28.1)	100 (32.1)
21-30	334 (23.9)	89 (28.5)
31 –	290 (20.7)	45 (14.4)
Total	1,399 (100)	312 (100)

Fifteen workers were excluded from data analysis: those without x-ray reports (n = 2), uninterpretable x-ray films (five), unsatisfactory pulmonary function data (four), and unavailable information regarding smoking habits (four). The following analyses are based on the residual 299 individuals.

All workers evaluated were white males ranging in age from 27 to 76 years. Age was positively correlated with length of employment (*r* = .853) as a sheet metal worker. Twenty-three percent had never smoked, 33% were current smokers, and 44% were ex-cigarette smokers. The proportion of current smokers was higher among sheet metal workers employed for less than 21 years than for those who had worked longer (Table 2). The proportion of ex-smokers increased with increasing duration of employment. Thus, ex-smokers were older and had worked longer than current smokers and nonsmokers. However, there was no significant difference in the average amount smoked between ex-smokers and current smokers. The mean age and length of employment of nonsmokers was significantly lower than the same measures in workers who had smoked an average of 2.5 to 3.0 packs/day ($p < .05$).

Roentgenographic Abnormalities — One hundred fifty-two workers (51%) had one or more pleural abnormalities. One hundred twenty-nine had bilateral pleural thickening, either alone (31), with calcified plaques (four), uncalcified plaques (89), or parenchymal opacities (five). Of the remaining 23 workers with pleural thickening, 21 had gross, bilateral uncalcified plaques, either alone (20) or with large opacities (one). One worker had bilateral calcified plaques (alone), while another had bilateral pleural calcification and parenchymal opacities. Six roentgeno-

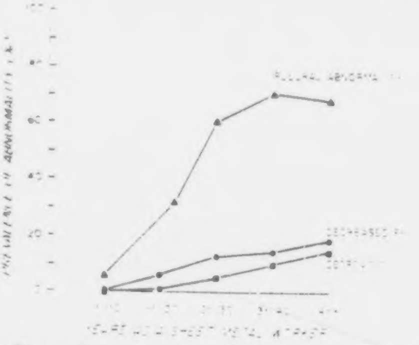

Fig. 1 — Pulmonary function testing and pleural abnormalities by duration of exposure.

Table 2 — Age and Smoking Status in All Study Participants According to Length of Employment

	Years as a Sheet Metal Worker					
	1-10	11-20	21-30	31-40	40+	Total
No. of workers	16	100	99	62	22	299
Mean age, yr	33.6 ± 7.1	37.0 ± 6.3	48.8 ± 8.6	56.9 ± 4.6	64.3 ± 4.3	46.9 ± 11.5
Smoking, %						
Current smoker	50.0	43.0	26.3	27.4	27.3	33.4
Ex-smoker	25.0	31.0	49.5	58.1	45.5	43.5
Nonsmoker	25.0	26.0	24.2	14.5	27.2	23.1

graphic abnormalities were limited to parenchymal opacities in the absence of any pleural disease. Among workers with diffuse bilateral pleural thickening, 35 (27.1%) abnormalities were of grade 2 extent.

Workers with normal x-ray films were younger and had been in the sheet metal trade for shorter periods than individuals with pleural and/or parenchymal abnormalities. Among those with bilateral pleural thickening (in the absence of calcification or parenchymal changes), workers with thickening of grade 2 were older and more often smokers (ex-smokers or current smokers). As expected, those with pleural calcifications were older.

The prevalence of pleural abnormalities increased with duration of employment as a sheet metal worker (Fig. 1). Prevalence rates ranged from 6.3% in workers with 10 or fewer years in the trade to approximately 70% in individuals with more than 30 years of experience. The χ^2 statistic for the overall differences in pleural disease prevalence rates was significant ($\chi^2 = 43.4$, $p < .001$). The hypothesis of a monotonic (linear) trend, however, was rejected. To isolate the sources of significant differences, prevalence rates were partitioned into two employment strata (group A: 1 through 20 years; group B: >20 years), with overall prevalence rates being calculated for each group. The prevalence for group A (0.43) was significantly lower than that for group B (0.65) ($\chi^2 = 17.65$, $p < .05$). In contrast, individual differences within each group were not significant (group A: $\chi^2 = 3.65$, $p > .5$; group B: $\chi^2 = 0.05$, $p > .05$).

Pulmonary Function and Asbestos Exposure — The prevalence of abnormal pulmonary function measurements was also associated with the length of employment. Among workers with fewer than 11 years of employment in the trade, all pulmonary function test results were above 80% of that predicted based on age, height, race, and sex. However, with increasing employment, the percentage of workers with decreased %FVC and %FEV$_1$ (i.e., <80% of predicted) increased up to 13.6% and 18.2%, respectively, in workers with more than 30 years employment (Fig. 1). Statistical analyses of the differences in prevalence rates were not performed since the number of workers with abnormal pulmonary function measurements in each stratum was small.

Pleural Abnormalities, Asbestos Exposure, and Smoking History — The overall association between length of employment and pleural abnormalities was highly significant ($\chi^2 = 5.73$, $p < .0001$) while controlling for smoking category (Table 3). The marginal rate of pleural abnormalities in ex-smokers (57.7%) was higher than that observed in current smokers (45.0%) and nonsmokers (46.4%). This finding may be explained, in part, by the observation that ex-smokers were older and had worked longer than current smokers and nonsmokers. A clear association of years of asbestos exposure and prevalence of pleural disease was also noted while controlling for average amount smoked during lifetime ($\chi^2 = 5.71$, $p < .01$). Within individual employment strata, the prevalence of pleural abnormalities appeared to increase in relation to average amount smoked (Fig. 2).

To evaluate further the associations between smoking, asbestos exposure, and pleural disease prevalence, logistic regression techniques were employed in which pleural disease was treated as the dichotomous dependent variable. In a preliminary analysis of all workers, the model of "best fit" including length of employment as the only significant independent covariate. Dummy variables representing smoking group (ex-smoker, current smoker, or nonsmoker) did not make a significant contribution. For workers with 10 years of employment in the trade, this model yielded a relative odds of having pleural disease equal to 1.91 (95% CI, 1.52 to 2.40) compared with individuals with one year of experience. The relative odds for workers with 20 and 30 years of experience (compared with one year) were 3.91 (95% CI, 2.42 to 6.33) and 8.02 (95% CI, 3.85 to 16.7), respectively.

To determine whether amount smoked was a more significant predictor of pleural disease than smoking group, a second analysis was limited to smokers. The model of best fit in this case included the average amount smoked and length of employment as significant covariates. Con-

Table 3 — Prevalence of Pleural Abnormalities in Study Participants by Length of Employment and Smoking Status

	Years as a Sheet Metal Worker			
	1-20	21-30	31+	Total
Smoking status, %				
Never smoked	26.7	54.2	73.3	46.4
Current smoker	27.5	57.7	69.6	45.0
Ex-smoker	31.4	65.0	69.6	57.7

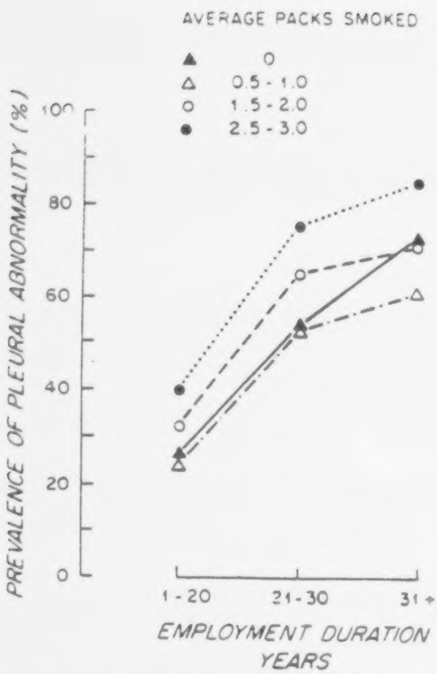

Fig. 2 — Rate of pleural disease by amount smoked and duration of exposure.

trolling for the effects of average amount smoked, this model yielded a relative odds of pleural disease of 1.84 (95% CI, 1.42 to 2.38) for workers with 10 years of experience compared with those with only one year in the trade. Workers with 20 and 30 years of experience had relative odds of 3.61 (95% CI, 2.09 to 6.25) and 7.10 (95% CI, 3.08 to 16.38), respectively, compared with individuals with one year of experience. Controlling for the effects of length of employment, the odds of having pleural disease among smokers of 1.0 pack/day relative to smokers of 0.5 pack/day was 1.31 (95% CI, 1.06 to 1.62). For workers who smoked an average of 2.5 packs/day, the odds of having pleural disease (relative to smokers of 0.5 pack/day) was 2.93 (95% CI, 1.25 to 6.86).

Pleural Abnormalities and Pulmonary Impairment — After excluding from analysis the 12 individuals with small irregular opacities on x-ray films, FVC was lower in individuals with pleural abnormalities than in workers having a normal x-ray film (99.5% of predicted v 103.2%) ($p < .05$). After stratifying by the average amount smoked and the length of employment, this relationship was still significant (Table 4). An analysis of variance showed significant contributions from variables indicating pleural abnormality ($p = .027$) and average packs smoked ($p = .057$), while employment duration was relatively unimportant ($p = .607$). The %FVC also appeared to be decreased in workers who smoked greater amounts per day. When this analysis was limited to a comparison of workers with normal x-ray films and those with bilateral pleural thickening of grade 1, similar results were obtained.

Percent FEV_1 was also lower in workers with pleural abnormalities (97.1% v 100.7% in individuals with normal chest x-ray films); however, this difference was not statistically significant (Table 5). After controlling for the average amount smoked and the length of employment, smoking was found to be the most important variable in explaining the observed trends in %FEV_1. Analysis of variance showed that average packs smoked was the most important variable ($p = .002$) in identifying sources of variability in the FEV_1, while employment duration ($p = .079$) and presence of pleural abnormalities ($p = .316$) were considerably less important.

For both %FVC and %FEV_1, all possible analysis of variance models that tested interactions of explanatory variables were evaluated and none were found to be significant. A slight, nonsignificant trend was noted between the extent and width of pleural thickening and the average pulmonary function measurements. Workers with greater than stage A1 pleural thickening had slightly lower %FVC and %FEV_1 than normal persons or those with A1 degree of pleural disease.

Discussion

This investigation revealed a high rate (51%) of pleural abnormalities in construction workers with moderate asbestos exposure. Only 12 workers (4%) were found to have parenchymal opacities, six of whom also had pleural abnormalities. The prevalence of pleural abnormalities in this population increased with length of employment as a sheet metal worker, prevalence rates being significantly higher in workers with more than 20 years of employment in the trade. In addition to asbestos exposure history, cigarette smoking appeared to have an effect on the rate of occurrence of pleural disease. In a logistic regression analysis of smokers, both the average amount smoked and the length of employment were significant determinants of the rates of pleural disease. FVC was reduced on average in individuals with pleural abnormalities, after controlling for age, height, amount smoked, and length of employment. In contrast, FEV_1 was not reduced in those with pleural disease, but was influenced significantly by smoking history.

These results support the view that pleural disease is the most prevalent roentgenographic abnormality in workers with moderate asbestos exposure. The highest prevalence rates of pleural disease occurred in individuals with the longest periods of employment. It is uncertain whether this was a result of cumulative dose to asbestos or a latency effect, and the present data cannot distinguish between these two possibilities.

Smoking was not a prerequisite of pleural disease development, because pleural abnormalities were identified in nonsmokers. Since the development of pleural disease in smokers without asbestos exposure has not been documented by other reports, the authors' findings of similar

Table 4 — Differences in Mean %FVC by Length of Employment, Amount Smoked, and Pleural Disease*

Employment Duration, yr	Average No. of Packs Smoked	Pleural Abnormalities: Present, %FVC (Mean ± SD)	Pleural Abnormalities: Absent, %FVC (Mean ± SD)
1-20	Nonsmoker	102.8 ± 14.5	107.3 ± 13.5
	0.5-1.0	97.3 ± 10.1	101.9 ± 8.3
	1.5-2.0	96.1 ± 10.6	102.6 ± 11.2
	2.5-3.0	94.2 ± 11.3	99.8 ± 0.9
21-30	Nonsmoker	104.8 ± 17.4	110.3 ± 13.7
	0.5-1.0	100.4 ± 8.3	97.0 ± 17.7
	1.5-2.0	99.0 ± 12.0	103.3 ± 18.1
	2.5-3.0	98.4 ± 12.3	100.4 ± 15.5
31 +	Nonsmoker	99.0 ± 12.8	104.8 ± 6.3
	0.5-1.0	99.5 ± 14.9	103.2 ± 21.4
	1.5-2.0	99.3 ± 19.1	99.1 ± 19.9
	2.5-3.0	99.1 ± 18.1	101.2 ± 12.3

* Workers with parenchymal or large opacities (N = 12) were excluded from this analysis

Table 5 — Differences in Mean %FEV$_1$ by Length of Employment, Amount Smoked, and Pleural Disease*

Employment Duration, yr	Average No. of Packs Smoked	Pleural Abnormalities: Present, %FEV$_1$ (Mean ± SD)	Pleural Abnormalities: Absent, %FEV$_1$ (Mean ± SD)
1-20	Nonsmoker	104.2 ± 16.4	108.2 ± 16.8
	0.5-1.0	97.6 ± 9.7	102.9 ± 11.0
	1.5-2.0	92.1 ± 10.7	100.7 ± 15.9
	2.5-3.0	92.2 ± 11.9	98.4 ± 12.7
21-30	Nonsmoker	107.3 ± 23.1	110.1 ± 14.3
	0.5-1.0	98.1 ± 14.3	92.1 ± 24.5
	1.5-2.0	93.8 ± 14.7	92.1 ± 18.9
	2.5-3.0	96.3 ± 13.0	98.2 ± 17.2
31 +	Nonsmoker	96.6 ± 17.2	109.6 ± 11.7
	0.5-1.0	98.3 ± 22.1	89.6 ± 36.2
	1.5-2.0	95.1 ± 18.1	93.1 ± 20.2
	2.5-3.0	94.3 ± 16.6	99.9 ± 5.23

* Workers with parenchymal or large opacities (N = 12) were excluded from this analysis

prevalence rates in workers with more than 30 years of employment, regardless of smoking group, suggest that smoking may increase the rate of development of pleural abnormalities in asbestos-exposed workers. In this sense, smoking is an effect modifier rather than a confounder of the association between asbestos exposure (employment) and pleural disease development. From these analyses, assessing the role of smoking on pleural disease, a better explanation of the data is provided by estimating amount smoked (heavily influenced by smoking duration) rather than by simply using smoking category, expressed as current smoker, ex-smoker, or never smoked.

A reduction in the %FVC in individuals with pleural disease suggests that the presence of pleural thickening on chest x-ray films may serve as an indicator of early restrictive pulmonary disease not diagnosable by characteristic opacities on chest roentgenography. This marker was not limited to the more advanced forms of pleural abnormalities since the relationship between %FVC and the presence of diffuse pleural thickening of grade 1 was also highly significant.

The composition of this study population was somewhat different from that of the entire union membership, with fewer individuals having worked for less than 11 or for greater than 30 years since initiation. However, the authors do not believe that selection bias was operating in this study because they would not expect workers to have any knowledge of existing pleural disease prior to the evaluations. Pleural disease does not manifest itself by causing chest pain or other pulmonary symptoms. Hence, workers would not volunteer because of a perceived disease condition. In addition, extensive occupational histories were compiled during the examinations to validate the length of employment in the trade. We reviewed union records to identify all eligible union members and the number of years since each worker's initiation. Those participating in our study were closely representative of the entire union membership (Table 1).

The findings of the present study agree with those of many other studies where pleural disease has been significantly correlated with the length of employment in a trade involving asbestos exposure.[8] Hedenstierna et al[6] did not find an association between %FVC and pleural disease, although they did observe a significant relationship between closing volume of the lung and pleural disease. Unlike Weiss and co-workers'[18] evaluation of asbestos workers, the authors did not find a strong association between smoking group and pleural disease. However, there does appear to be an association between the average amount smoked and the rate of development of pleural disease in asbestos-exposed individuals.

The high rate of pleural disease in this population of moderately exposed asbestos workers indicates a surprisingly high extent of asbestos-related disease in a group of workers with exposures comparable with exposures in many trades in the construction industry.[5] This study, along with others described above, points to an alarmingly high rate of disease among this large working population. Since pleural disease, as a marker of asbestos exposure, points to the occurrence of more severe conditions, particularly asbestos-related pulmonary disease and malignancy, future surveillance of populations with similar exposure is warranted. More importantly, prevention of further exposure to asbestos in construction workers is essential to prevent the occurrence or the exacerbation of disease in the future.

Acknowledgments

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Senator DURENBERGER. Mr. Carlough, I would appreciate your doing that. And I believe there are several other unions who have been asked to provide similar kinds of evidence. And, particularly, to reach back in time in some of these unions to the concerns that were raised on behalf of members of the union with regard to the effects of working with asbestos.

So I appreciate your taking the time to come here today. And I also heard what you said about Dr. Selikoff. And I think there are probably other people that deserve to be heard on the medical side of this evidence as well.

Mr. CARLOUGH. May I add one small thing of our concern, Mr. Chairman?

Senator DURENBERGER. Certainly.

Mr. CARLOUGH. We are not a union with great resources. We are a union of approximately 150,000 people. In order to conduct the kind of study that we are conducting in conjunction with Mount Sinai School of Medicine, our general executive council voted a week ago to sell 40 percent interest in the wonderful building that we now share with three other unions at 1750 New York Avenue—that's just brick and mortar. The health of our membership is far more important.

Senator DURENBERGER. Senator Armstrong.

Senator ARMSTRONG. Mr. Chairman, I appreciate Mr. Carlough's testimony. And since my purpose in introducing this legislation was to see if we could get a focus on the problem, and since I have made it clear—I want to say again that I'm not committed to the detail of this bill in the slightest. If there are better ideas, I'm ready to hear them.

But the reason that I got interested in this problem in the first place is that I was persuaded that if we do nothing, if we just let nature take its course, that the asbestos industry will be liquidated, and a large number of workers or former workers will be filing claims after the industry has been liquidated. And they won't have anybody to come back on. So it appears to me that unless some legislation is adopted, or some plan worked out in the private sector is adopted, that the people who will be most hurt and disadvantaged will be workers who don't yet know that they suffer from this disease. And it is really their interest, it seems to me, that is paramount at this point.

I wonder if you would agree with that. And maybe just say for the record—I believe I know your answer, but would you say for the record whether or not you are opposed to legislation generally or only want to have a different form of legislation?

Mr. CARLOUGH. Senator, we desperately need some form of legislation that recognizes not only what the problem has been in the past and in the present, but I'm truly afraid that's just the tip of the iceberg and that downstream the problem is going to be worse. We need a truly adequate system of occupational compensation. Not just related to asbestos. There is nickel. There is chromium. There are so many problems from handling metals in the country. But we can start. We will start with asbestos.

We need an adequate program of compensation that addresses the real problem that the individual has, provides a proper form of compensation, but also it should not be an exclusive remedy where it has been demonstrated that manufacturers knew years ago and still did not give adequate warning to their workers. If my member is going to operate a press brake or a lathe, he knows there is some danger in operating it. That's why a lot of our guys walk around without thumbs. OK. But he knows that. He's been warned about it. And so if the accident occurs, it's regrettable, but there have been precautions taken. In our judgment this has not been true of the asbestos industry. So we would oppose any form of compensation bill where the remedy was exclusive. We would leave open that small part of the door, small part of the door, where it can be demonstrated that the manufacturers knew what they were doing and still spread the plague.

And I would suggest the Wellington plan was mentioned here earlier. Dean Wellington from Yale who has put together a fine plan, I do believe, in light of all the difficulties and the circumstances. Even the Wellington plan, which is based on a private arbitration procedure, does leave open the door for a legal remedy in some cases. And I think that door ought to be left open.

Senator ARMSTRONG. Is the test of that whether or not the workers involved had adequate notice? Is that your point?

Mr. CARLOUGH. That's one way of saying it. Adequate warning, adequate notice.

Senator ARMSTRONG. Well, I thought I heard you saying something which I——

Mr. CARLOUGH. I was never told when I was ripping out a system in B. Altman in 1951 and 1952 that there was a danger of exposure to asbestos. There wasn't any notice at that time. There wasn't any warning whatsoever.

Senator ARMSTRONG. I really don't want to pursue this, but I think I'm obligated to. Are you saying that the companies knew this, but the workers did not?

Mr. CARLOUGH. I know that the workers did not, sir.

Senator ARMSTRONG. Are you familiar with a publication called the Asbestos Worker?

Mr. CARLOUGH. It's a publication of another union in the construction industry. I've heard of it.

Senator ARMSTRONG. I would like to furnish to you an article published by that publication long before you tore that stuff out of B. Altman in 1951, which is entitled "The Pulmonary Asbestosis Menace," in which, in fact—this publication, which I understand to have been put out by the AFL-CIO—talks at some length and very persuasively about the dangers of dealing with asbestos.

The reason why I don't think this is too productive a line of inquiry is that if we want to go back and litigate whether or not the Government was knowledgeable—the Justice Department denies that they were in testimony before the House. They said, oh, we didn't basically know about this, only the companies knew it, which is baloney. Or if the AFL-CIO wants to come forward and say, well, we didn't know about this so we couldn't warn our workers, I don't find that very federal, Mr. Carlough.

To their credit, the companies are not trying to get out of their obligation, I don't believe. Now maybe I'm wrong about that. But I would encourage you, Mr. Carlough, not to dwell on that point because I think the documentary record is pretty clear that there were a lot of people who knew about it, including the labor organizations and that over a long period of time many articles were published which raised this question.

Now the particular article I'm referring to was published in September 1930. And, in fact, we had testimony just a few minutes ago that the Navy adopted, but did not abide by, standards which took into account this menace And I think that's a regretable chapter of American Government-industry-labor cooperation. But the reality is that it was a danger which was known. And I don't think that ought to too much influence the outcome.

I mean the question, it seems to me, is what are we going to do for the benefit of these people who have got the disease. And I hope we could not let that get lost in the shuffle.

Mr. CARLOUGH I want to focus on that question also, Senator, but I am going to have to dwell on it, sir, since you did, for a moment.

Chairman McKinney stated earlier today that at a point in the 1930's there was an awareness of the danger for those in a factory handling asbestos. There's a time sequence to these dangers. For anyone who has worked with this problem for any length of time—the asbestos workers as a union became more aware than any other construction union at an earlier point in time, although the Selikoff studies, which proved the conclusive relationship to asbestos—whether you smoked or not—to working directly with asbestos and its impact on forms of lung cancers as a direct relationship only were in the 1960's, I do believe, when he studied two local unions over in New Jersey, the first two studies the doctor undertook. The rest of us in the construction industry, for many, many years, understood the danger of working directly with asbestos itself, but not the danger of working on a site where you were exposed to asbestos dust. That sort of danger is still not recognized today. And part of the reason we are working with Dr. Selikoff is to educate our members as well as to provide the clinical studies and do a few other things.

Senator ARMSTRONG. Well, Mr. Chairman, I think that makes the point.

I just don't see that it's very useful to pursue that further. Maybe if it becomes more relevant to a solution, I'll do so. I think it's pretty clear that some degree of danger was widely recognized many, many years before the cases which are now being litigated in court; that is, before the job situations which have resulted in the recent litigation. Now that doesn't make it right, but I think that's nonetheless a fact and I don't quite understand what there is to be gained by anybody trying to deny that this was a known fact.

I haven't had a chance yet to talk to the Government witnesses, Mr. Chairman, but when we get around to them—I guess that's not today. They haven't, as I understand it, been scheduled for today. But I'm going to be very interested to find out why the Justice Department and others think that nobody knew about it because it was very clear that this was a danger.

But I want to come back to one issue, just so we have got this on the record.

You do not object to the idea that the Government ought to pay a portion of these claims?

Mr. CARLOUGH. I believe that all parties who were involved in it ought to pay their fair share. I don't know what the extent of the Government's involvement is in it.

Senator ARMSTRONG. I understand that. I'm going to ask you that next. Do you agree with the statement of Mr. McKinney that were the Government not protected by sovereign immunity that they already would be required by the courts to pay a portion of this cost?

Mr. CARLOUGH. I just don't want to be linked to the chairman of the Manville Corp., sir, in my testimony. [Laughter.]

Senator ARMSTRONG. All right. Let me rephrase my question. Do you agree with the statement of an anonymous person that the Government would be required to pay a portion of these were they not protected by sovereign immunity?

Mr. CARLOUGH. I would say—I'm a sheet metal worker; I'm not a lawyer, Senator.

Senator ARMSTRONG. I understand. I'm not a lawyer either.

Mr. CARLOUGH. I would say that certainly—I hate to use the words "guilty parties." I'm not seeking——

Senator ARMSTRONG. Responsible parties.

Mr. CARLOUGH. It's——

Senator ARMSTRONG. It's not a question of guilt.

Mr. CARLOUGH. I'm seeking really justice for our members and all of the members who are affected. I don't want to get off that point, but I would say that without regard to the kind of immunity that I learned about in a political science course a lot of years ago—without regard to the Government's immunity—that all parties ought to share equally in the burden because it's a great burden.

Senator ARMSTRONG. Yes.

Mr. CARLOUGH. All responsible parties.

Senator ARMSTRONG. What I'm really trying to pin down is whether or not this is a bailout. If you feel that the Government has a moral responsibility, which, in fact, would be a legal responsibility were it not for sovereign immunity, then clearly it's not a bailout. But if the Government really is an innocent party, then stepping in is bailing out somebody, whether it's the workers or the companies or whoever it is. It is a bailout.

Mr. CARLOUGH. I listened to Chairman McKinney this morning with great interest in response to a question that was raised as to the impact of this legislation on the Silverman proposal which is the—the parties are agreeing to or are ostensibly are in the process of agreeing to bankruptcy court. And if I heard the chairman correctly, he stated that without regard to what happens to S. 1265 or similar legislation on the subject that the Manville Corp. planned to go forward. I believe I heard him correctly in saying that.

Senator ARMSTRONG. I believe that's right.

Mr. CARLOUGH. If that's so, I believe it poses another problem in the language of the bill, because there is, I understand, a provision in S. 1265 that to the extent a company involved in the industry has made a payment in pursuit of litigation or language to that effect that that becomes an offset to that corporation's responsibility to the trust fund created under this act. If this is so and if the Manville Corp. does proceed as the chairman stated this morning under the Silverman plan in bankruptcy court, given the sums that the chairman talked about today that Manville's trust fund would be subject to for these some 16,500 litigants—I think is the number at the present time—and since Manville, I would assume, would have been the largest single contributor to this trust fund, I'm not sure where that leaves the trust fund under S. 1265.

Senator ARMSTRONG. Let me try once more.

In your opinion, Mr. Carlough, is the Government morally obligated to pay a portion of the cost of this problem?

Mr. CARLOUGH. In any appropriate settlement of a proper occupational disease act, the Government should pay its fair share.

Senator ARMSTRONG. Thank you.

Senator DURENBERGER. Mr. Carlough, I thank you very much for your testimony. And as I indicated, the record will remain open if you have additional testimony. We may have some additional questions to ask.

Mr. CARLOUGH. Appreciate it very much, Mr. Chairman. Thank you.

Senator DURENBERGER. Thank you.

Our next witnesses are Mr. Ronald Motley, an attorney from Charleston, SC; Mr. Jay Power, legislative representative for the AFL-CIO; and Mr. David Molino, deputy director for legislation, Industrial Union Department of the AFL-CIO; and Mr. Donald Elisburg, an attorney with Connerton & Bernstein.

Your statements will be made part of the record. You may proceed to summarize them now, adhering, if you will, to the 5-minute limitation. And, Mr. Power, as far as the Chair is concerned, you can take an extra minute or two to talk about how many times unions like the asbestos workers' unions in the 1920's and the 1930's and the 1940's and the 1950's were trying to do something about occupational safety and health and couldn't get away with it. So that saying that the union may have known something about the problem hardly excuses employers or the Government or anybody else from liability for creating those problems. If you want to take a couple of minutes to talk about the difficulties of occupational safety and health in America in that period of time, you are welcome to do it.

We will begin with Mr. Motley.

STATEMENT OF RONALD L. MOTLEY, ATTORNEY, CHARLESTON, SC; CHAIRMAN, ASBESTOS LITIGATION GROUP

Mr. MOTLEY. Thank you, Mr. Chairman.

Rather than summarize my statement, I would like to comment on some of the statements that were made by my predecessors.

Senator Armstrong, very rightly, is concentrating on the issue of whether or not this particular proposed legislation constitutes a bailout. If I might demonstrate to you the typical case. A typical case is a construction worker who worked in and around asbestos for 25 or more years. He's in his mid- to late fifties. He has asbestosis, but it has not progressed to the point where it currently disables him. But asbestosis is a progressive disease.

He sues 15 to 20 manufacturers of asbestos products. His settlement exceeds $125,000.00, exclusive of the Manville Corp., which has been in chapter 11 proceedings since 1982.

This particular bill would provide that worker with nothing because the bill, as I understand it, is triggered only when a person becomes disabled. So under this bill, this particular typical case would get nothing, but he would lose his right to a third-party remedy.

So you ask why is this a bailout bill. If the Government pays 50 percent and a maximum benefit of $30,000 to $35,000 when the asbestos companies are now paying $125,000, you can readily understand, Senator, why every victims organization in this country is unanimously opposed to this particular legislation. And one of the organizations, the White Lung Association, changed the wording of the legislation from the Asbestos Workers' Recovery Act to the Asbestos Victims' Burial Act.

I'm authorized to advise you that the largest asbestos victims' organization in the United States, the Asbestos Victims of America, is outraged by this legislation. And Mr. Vermulin has asked for an opportunity, if there are additional hearings in the immediate future, to be allowed to testify in his opposition to this or any other form of bailout legislation.

I would also, Senator Armstrong, like to comment about the Manville bankruptcy proceedings, since you asked questions about that.

I'm one of the six persons appointed by the bankruptcy court to negotiate with Manville, and I can assure you, sir, that there is no settlement of the Manville bankruptcy. We are involved in very sensitive negotiations. There has been no settlement reached. The victims are very concerned about many provisions, including the good faith of the Manville Corp., which has not been evidenced in the past. And there is no settlement at this time. Everyone is hopeful. There is progress. The discussions are fruitful, sobering, and serious, but there has been no settlement and I would not want this committee to be misled into thinking there has been a settlement.

I would also, sir, like to make comment about—I find it interesting that the two companies who are the greatest perpetraters of the plague that we now have are shedding such crocodile tears for the workers and this committee. I will not get into a name-calling contest with the chairman of the Manville Corp., but I would ask the committee, respectfully suggest to you that you review the four-part series in the New Yorker magazine by investigative reporter Paul Brodeur, which he has quotations from courts, different people around the country, calling the Manville Corp., and Raydustis Manhattan outrageous perpetrators of fraud on the public; insensitive to human life; committing outrageous acts to human beings. And the litany of the acts, activities of these two corporations.

I would finally, sir, point out that there is currently a private endeavor which I'm also cochairman of the Committee of Victims who are working with that corporation—the so-called Wellington plan. While there has been no meeting of the minds completely on that, certainly the alternative dispute resolution system which provides the victims with an opportunity to litigate their claims in court before a jury is certainly preferable to this bailout legislation which is just—absolutely adds nothing to the $30,000 sir—to the already pitiful State workman's compensation benefits is nothing.

When the average settlement is $125,000, to suggest that an additional $30,000 in exchange for that, with the Government paying 50 percent, is nothing more than a bailout.

Thank you.

[The prepared written statement of Mr. Motley follows:]

STATEMENT OF RONALD L. MOTLEY
CHAIRMAN, ASBESTOS LITIGATION GROUP
BEFORE THE HEALTH SUBCOMMITTEE HEARING,
SENATE COMMITTEE ON FINANCE
REGARDING SENATE BILL 1265

STATEMENT OF RONALD L. MOTLEY

I am pleased to appear before this Subcommittee today in connection with its hearings on Senate Bill 1265 which would, if put into effect, drastically alter the manner in which asbestos victims seek third-party remedies from asbestos manufacturing concerns. I am appearing here today as Chairman of the Asbestos Litigation Group, an organization of over 125 attorneys who represent approximately ninety percent (90%) of the asbestos victims of the United States who have filed third-party product liability claims against various asbestos manufacturing companies.

S. 1265 is a contradiction in terms. When it was introduced on June 7, 1985 by Senator Armstrong, he called it the "Asbestos Workers Recovery Act" yet described it as "legislation [which] was written jointly by many asbestos manufacturing companies including Manville Corporation located in my own state of Colorado." It is an act ostensibly designed to help the suffering American asbestos worker yet no asbestos worker or asbestos victims organization was consulted. The identical "Asbestos Workers Recovery Act" (H.R. 1626) was denominated the "Asbestos Workers Burial Act" by the White Lung Association, an asbestos victims organization in testimony before a U.S. House Subcommittee. It is not an act to protect the workers, but an act to shield the asbestos companies from the scrutiny of the American people who serve on juries and pass judgment upon their prior conduct. It is an effort and not the first, that has been undertaken by asbestos companies to obtain "bail-out" legislation which would terminate the victims' right to address asbestos industry culpability before juries in the various state and federal courts of this Country. Senator Armstrong when introducing this legislation made no reference to consultations with the two existing asbestos victims organizations in the United States, the Asbestos Victims of America and the White Lung Association, for if he had, you would have learned of their unanimous outrage at this legislation.

I am authorized by James Vermeulen, Executive Director of the Asbestos Victims of America, to advise you that his organization, which is comprised of thousands of asbestos victims in various states across this Country, is totally and unalterably opposed to any federal legislation which would impinge upon or totally eliminate victims' rights to seek compensation via the third-party tort suit. The White Lung Association has already lodged a similar, strongly worded protest in testimony on June 11, 1985 before the United States House of Representatives Subcommittee on Labor Standards which was investigating H.R. 1626, a carbon copy of S. 1265.

Thus, the asbestos victims groups in the United States are totally opposed to the instant legislation. But that should not be surprising. You have before you legislation affecting the constitutional rights of these thousands of victims yet they were not even consulted. You have before you legislation which was drafted by the very companies whose products reclassified the Amerian asbestos worker as the American asbestos victim. Is it not surprising they oppose it?

The purpose of my testimony here today is to present to the United States Senate information regarding the culpability of the asbestos companies. With the limited time available, I can only touch upon this topic yet I invite you to examine the thousands of pages of internal documents of the asbestos companies which clearly evidence their wrongful acts and cover-up of the hazards of asbestos. These documents are well summarized in a series of articles by Paul Brodeur which appeared this summer in the New Yorker.

In addition, I would respectfully bring to the attention of the United States Senate the existence of a recently created private organization of certain asbestos producers and their insurers whose purpose is to expedite and streamline the resolution of third-party asbestos claims against their members, which if successful, would negate, for these companies, their need for federal preemption of common-law suits.

1. The sorry history of the asbestos industries' shirking of its responsibility to the consuming public.

In 1955, A. R. Fisher who was soon to become president of the Johns-Manville Corporation (now Manville Corporation), a chief sponsor of S. 1265, stated before the Industrial Hygiene Foundation's annual meeting as follows:

> As with the rest of industry, we are also aware of our responsibilities to the consuming public. Today, the products of industry are designed to promote the health and comfort of the public. Industry is constantly striving to bring about more pleasant living through improved products at better values to the consumer. Moreover, every effort is made nowadays to protect the consumer with safer products and better methods of handling them.
>
> Years ago industrial research was unconcerned about problems of health and safety that might be involved in a product. When the product was developed, it was put on the market. Today our industrial research organizations probe into every health hazard. And every safeguard is insisted upon before the product is marketed to the consumer. . . . See Attachment A.

Mr. Fisher's proclamation of the Manville Corporation's duty to the consuming public well states the premises underlying the common-law duty of a corporation to investigate the potential health hazards of its products and to inform the consumers of the same. The Manville Corporation's history of corporate irresponsibility stands in sharp contrast to Mr. Fisher's self-serving pronouncements. It cannot now be denied by the asbestos industry that by 1935 hundreds of their own employees had gotten sick or died from exposure to asbestos during the manufacturing process. Despite this knowledge, no warnings were issued to the users of asbestos. As to Manville's role, one federal judge, after hearing all of the evidence presented to the jury, stated that "the conduct of Johns-Manville amounted to outrageous conduct which would support a punitive damage award . . . . " Neal v. Carey Canadian Mines Ltd., 548 F. Supp. 357 (E.D.

Pa. 1982). The court in the Neal case then stated that: "Testimony indicated that Johns-Manville continually failed to warn users of hazards associated with the inhalation of asbestos fibers despite overwhelming knowledge of those hazards by high-ranking corporate officials . . . . " Id. In a separate case, another federal appellate court characterized testimony entered against the Manville Corporation and others as showing: "[Manville and others] were aware of the risks associated with asbestos products and that they were concerned about possible unfavorable publicity if these risks became widely known." Dartez v. Fibreboard Corporation, et al., 5th Cir. July 15, 1985.

Jury after jury and court after court, when shown the overwhelming evidence of negligence, intentional wrongdoing and subsequent coverup of the hazards of asbestos by the asbestos industry, have reacted by not only awarding compensation to the victims but many times meting out punitive damages to punish the corporations for their scandalous activities in the 1930's, 40's, 50's, 60's and 70's.

It is not surprising that those companies, pushing the hardest for this legislation, are the ones whose activities in the past are the most contemptible. Besides Manville Corp., one of the primary sponsors of the current proposed legislation is Raymark Industries, formerly Raybestos-Manhattan. It has been discovered in court proceedings that in 1974 Raybestos-Manhattan's own Director of Health and Environmental Affairs, John Marsh, presented a memorandum to the President of the corporation in which he characterized Raybestos-Manhattan's role in the litigation as follows: "For the past two years and particularly during the last 18 months, I have attempted to communicate to R/M management the seriousness of the asbestos health issue as it relates to R/M. I thought the meeting in June 1973 at which mortality [death] and morbidity [disease] data was reviewed in detail would be more than sufficient to shock people into action . . . Little action except N. Ch. & Marshville . . . - R/M health record textiles indefensible." See Attachment B.

In a recent four-part series of articles analyzing the asbestos third-party litigation, acclaimed investigative reporter Paul Brodeur of the New Yorker characterized the asbestos litigation story as follows:

> One obvious lesson to be learned from the fifty-year asbestos-disease saga is that a society that cannot summon up the sense to protect the lungs and the lives of its workers cannot hope to protect the lungs and the lives of its other citizens, including its children. Specifically, if we had been able to muster up the courage and the conviction to safeguard the health of our asbestos workers back in the nineteen-thirties and nineteen-fourties, when the first serious warnings about the asbestos-disease hazard were issued, we would surely not have allowed asbestos to be used in thousands of school buildings that were constructed in the United States between 1959 and 1972, and would thus not be faced today with the prospect of spending billions of dollars to decontaminate these schools of asbestos, or with the anxiety of wondering what past asbestos exposure will mean for the future well-being of the millions of children who have been attending them. . . .

> The health hazard posed by this ubiquitous and invisible fibre of stone has not only sifted into the far corners of our society but called into question the conduct of a huge cross-section of the institutions that make up the private-enterprise system, including many of its manufacturing corporations, insurance companies, investment houses, law firms, trade unions, and governmental regulatory agencies, as well as many members of the medical and legal professions, the scientific community, and Congress. . . .

The New Yorker, July 1, 1985 (p. 78). Brodeur laboriously interviewed principals in the asbestos litigation and meticulously scrutinized trial and appellate records in organizing a damning indictment of the asbestos industry in its entirety and two of the principal sponsors of S. 1265 (J-M and R-M) in partiular. With the permission of Mr. Brodeur, I would like the opportunity of providing the Subcommittee with copies of the four-part series of articles on the subject of the culpability of the asbestos industry as well as copies of corporate internal documents detailing corporate wrongdoing and coverup. See Attachments A-F.

I could go on and on with details, but I could not state the case any better than the succinct statement by the Florida Court of Appeals that the acts of the Manville Corporation evidenced a "reckless disregard for human life . . . . " Johns-Manville Sales Corporation v. Janssens, 463 So.2d 242 (1st Dist. Ct. App. 1984), rehearing denied, 463 So.2d 263, petition for review denied, No. 66, 256 (Fla., April 24, 1985).

2. The Wellington Plan

Earlier this summer 16 asbestos producers and 34 of their insurers announced an agreement to institute an asbestos claims facility which has as its purpose streamlining the cost of litigation and expediting benefits to victims of asbestos exposure known as the Wellington group, these companies have initiated meetings with the Asbestos Litigation Group towards the end of designing a facility which will serve the aforestated goals. Attached hereto as Attachment G is a letter from Dean Wellington to various federal judges regarding the functioning of the voluntary system.

While many of the signatories of the Wellington Plan are also drafters of S. 1265, their desire for relief under S. 1265 will be greatly reduced if the Wellington Plan goes into effect. Thus, there should be an alleviation of court congestion due to early and hopefully fair settlement of the third party disputes thus accomplishing the long term aims of S. 1265 without disrupting the common-law tort system so zealously guarded over the past two hundred years in this Nation. While the Asbestos Litigation Group and the organizations of asbestos victims unequivocably oppose federal intervention for any reason, we nevertheless urge that this Committee at the very least defer further action on the instant legislation until such time as the Congress can examine the effects of the Wellington Plan and the ability of the private sector to deal with the issue without the expenditure of federal taxpayer money.

Conclusion

The asbestos victims have been ignored for decades by the asbestos industry. Thus, it is not surprising that their interests and desires were toally ignored by the draftsmen of this legislation. Victims of inattention by the asbestos industry in the past, dead and dying asbestos workers are about to be doubly victimized and if fair-minded U.S. Senators pay attention to this ill-advised asbestos industry "bail out" bill. The asbestos victims urge this Committee to ignore these special interests which for decades ignored and denied the human tragedy which they engendered.

TWENTIETH ANNUAL MEETING
INDUSTRIAL HYGIENE FOUNDATION OF AMERICA

HELD AT
MELLON INSTITUTE
PITTSBURGH, PA.

NOVEMBER 16 and 17, 1955

TRANSACTIONS OF
The General Meeting

AND

The Conferences—

—Medical
—Chemical-Toxicological
—Joint Medical and Chemical-Toxicological
—Legal
—Engineering
—Joint Engineering and Legal

THE ECONOMICS OF INDUSTRIAL HEALTH

A. R. FISHER
President, Johns-Manville Corporation

As a trustee of the Industrial Hygiene Foundation, it is only natural, I suppose, that I should be quite enthusiastic about its aims and its accomplishments during its twenty years of service to industry. To me, the Foundation exemplifies what is being done by privately supported institutions to improve the health of the nation.

When I use the word "health," I do not restrict it to its physiological sense. My concept of it is much broader than that. And I am sure yours is too. Nowadays when we speak of health, we do not think only about diseases and injuries that afflict mankind. Equally important are the mental well-being and the personal dignity of man and the members of his family.

Throughout the ages man's well-being has been his chief concern. Since the dawn of civilization, man has sought protection against common ailments and dreaded epidemics. But for the most part, man's efforts were individual and inspired by his instinct for self-preservation. Neither the ruling classes nor private groups paid much attention to the health of the community.

Our world is many thousands of years removed from primitive man who first sought shelter in a cave and who later relied on a fanatical medicine man to cure his physical and mental ills. And yet, in many regions of the globe, millions of people exist under conditions not too unlike those of primitive man. Poverty, ignorance and superstitions prevail. Disease is rampant. The death rate is high. In many areas, human life is considered cheap and expendable. It is a burden to be cast off.

The Most Effective Approach

It is only in our Western civilization that real progress has been made. And the greatest progress has been recorded in the United States and Canada. Perhaps there is a definite reason for this. Ours is the middle approach. We do not leave the problem of the nation's health entirely to the government. We do not leave it entirely to private groups. Nor do we neglect it or merely pay lip service to it. Through experience, we have found our way to be quite effective.

Other countries may not agree with the way the nation's health is handled in the United States and Canada. In this connection, I giene Foundation is currently investigating the properties of one of our newer products.

All of these features of our program are based on keeping the employee in good mental and physical health. They enable him to be more useful to himself, his family, his company and his community.

Responsibility to the Consuming Public

[As with the rest of industry, we are also aware of our responsibilities to the consuming public. Today, the products of industry are designed to promote the health and comfort of the public. Industry is constantly striving to bring about more pleasant living through improved products at better values to the consumer. Moreover, every effort is made nowadays to protect the consumer with safer products and better methods of handling them.

Years ago industrial research was unconcerned about problems of health and safety that might be involved in a product. When the product was developed, it was put on the market. Today our industrial research organizations probe into every health hazard. And every safeguard is insisted upon before the product is marketed to the consumer.] . . .

A number of companies have established research organizations and laboratories for the sole purpose of eliminating health hazards that might injure the consumer. Some companies have granted fellowships for this specific purpose.

And industry has inspired, to a very great extent, the movement to label properly certain types of products that might harm the consumer if he were not forewarned.

Health and Safety Outgrowth of Free Enterprise System

All of these things not only help the individual employee and consumer, but the community at large. Modern plants, in which nuisances and health hazards are reduced to a minimum, are the order of the day. And in their construction, every consideration is given to healthful and safe working conditions.

Now how has this come about?

In my opinion, it is the natural result of the free enterprise system directed by enlightened men of modern management who are aware of the fact that employees are first of all human beings, not mere commodities to be exploited. Under our system, modern management has had the freedom to progress. It has not been shackled by the totalitarian state or dictator.

For the past two years and particularly during the last 18 months, I have attempted to communicate to R/M management the seriousness of the asbestos health issue as it relates to R/M. I thought the meeting in June 1973 at which mortality and morbidity data was reviewed in detail would be more than sufficient to shock people into action.

except N.Ch & Marshville
This has not happened. Little action - very poor communications. - See next pg

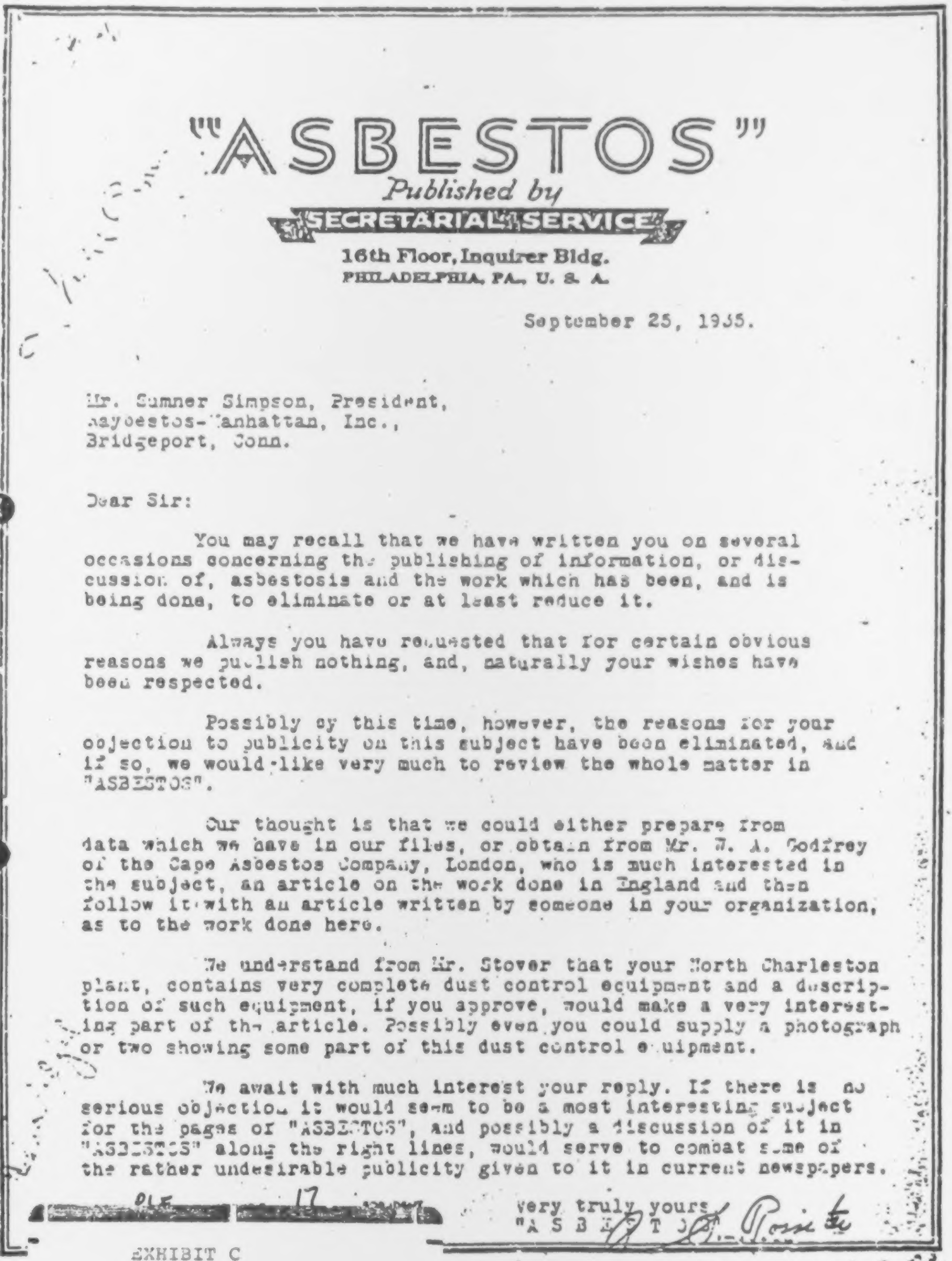
Important to understand.
R/M is in a unique and vulnerable position - not typical of asbestos industry as a whole - H K Porter probably next most vulnerable

Other more hazardous operations have been eliminated. Patterson insulation plant shut down. Tyler, Tex. insulation plant eliminated, JM dusty operations cleaned up or shut down.

- R/M health record ^textiles^ indefensible - must face it and not getting better
- present counts high - exposure still excessive

EXHIBIT B

205



"ASBESTOS"
Published by
SECRETARIAL SERVICE
16th Floor, Inquirer Bldg.
PHILADELPHIA, PA., U. S. A.

September 25, 1935.

Mr. Sumner Simpson, President,
Raybestos-Manhattan, Inc.,
Bridgeport, Conn.

Dear Sir:

You may recall that we have written you on several occasions concerning the publishing of information, or discussion of, asbestosis and the work which has been, and is being done, to eliminate or at least reduce it.

Always you have requested that for certain obvious reasons we publish nothing, and, naturally your wishes have been respected.

Possibly by this time, however, the reasons for your objection to publicity on this subject have been eliminated, and if so, we would like very much to review the whole matter in "ASBESTOS".

Our thought is that we could either prepare from data which we have in our files, or obtain from Mr. W. A. Godfrey of the Cape Asbestos Company, London, who is much interested in the subject, an article on the work done in England and then follow it with an article written by someone in your organization, as to the work done here.

We understand from Mr. Stover that your North Charleston plant, contains very complete dust control equipment and a description of such equipment, if you approve, would make a very interesting part of the article. Possibly even you could supply a photograph or two showing some part of this dust control equipment.

We await with much interest your reply. If there is no serious objection it would seem to be a most interesting subject for the pages of "ASBESTOS", and possibly a discussion of it in "ASBESTOS" along the right lines, would serve to combat some of the rather undesirable publicity given to it in current newspapers.

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Very truly yours
"ASBESTOS"
A. Rossiter

EXHIBIT C

Bridgeport, Conn.
Oct. 1, 1935

Mr. Vandiver Brown, Attorney,
Johns-Manville Corp.,
22 East 40th St.,
New York City.

My dear Mr. Brown:

Enclosed is copy of a letter received from Miss Rossiter, of "Asbestos."

As I see it personally, we would be just as well off to say nothing about it until our survey is complete. I think the less said about asbestos, the better off we are, but at the same time, we cannot lose track of the fact that there have been a number of articles on asbestos dust control and asbestosis in the British trade magazines. The magazine "Asbestos" is in business to publish articles affecting the trade and they have been very decent about not re-printing the English articles.

I shall be pleased to have your opinion in the matter.

Very truly yours,

SS-G.

Enc.

President

PLF EXHIBIT
WITNESS HINSHA
REPORTER RITA A. WELC

Johns-Manville
Twenty-Two East Fortieth Street
New York, N.Y.

October 3, 1935

Mr. S. Simpson, President,
Raybestos-Manhattan, Inc.,
Bridgeport, Conn.

My dear Mr. Simpson:

I wish to acknowledge receipt of yours of October 1st enclosing copy of the September 25th letter from the editor of the magazine "ASBESTOS". I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity. Even if we should eventually decide to raise no objection to the publication of an article on asbestosis in the magazine in question, I think we should warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

I believe the question raised by Miss Rossiter might well be considered at the committee meeting scheduled for next Tuesday, at which I understand both you and Mr. Judd will be present.

Very truly yours,

Vandiver Brown
Attorney

VB:T

58
1-4-80

EXHIBIT E

Former Chairman of the Paterson Industrial Commission, Charles H. Roemer, who was unaccustomed to the rich fare he enjoyed as a guest at Johns-Manville, recalled the following story in a sworn affidavit filed in 1982. The document's text is reprinted in its entirety.[57]

1. I am an attorney who was admitted to practice in the State of New Jersey in 1920 and presently maintain an office at 99 Broadway, Elmwood Park, Bergen County, New Jersey.
2. I was born February 5, 1899 and am presently under the care of Dr. David Roth.
3. Sometime in 1942-43, I was advised by my cousin, Dr. Jacob Roemer, that in the course of reviewing chest X-rays of employees at the Union Asbestos and Rubber Company's Paterson plant he had observed a significant number with lung changes which he believed were due to exposure to asbestos. Dr. Roemer suggested that the men be advised of his findings and that they secure outdoor employment which did not involve exposure to asbestos dust. Dr. Roemer said unless this was done immediately the men would suffer from painful asbestos diseases.
4. Immediately I reported what Dr. Roemer said to Robert Cryor, the Union Asbestos and Rubber Company Plant Manager, and Edward Shuman, the Assistant Plant Manager.
5. I was then informed that in accordance with the labor union contract, the 5 or 6 employees in question could not be discharged without the consent of the union. The union refused to consent to their dismissal.
6. I then suggested that since Johns-Manville was the largest asbestos company in the country, we should set up an appointment to see how they were handling the asbestos health problem.
7. Mr. Cryor and Mr. Shuman set up an appointment with Johns-Manville. Shortly thereafter, Mr. Cryor, Mr. Shuman and I met with Vandiver Brown, General Attorney for Johns-Manville and the President of the Corporation, at Johns-Manville corporate headquarters in New York City.
8. We advised the Johns-Manville officials of Dr. Roemer's findings and asked them if Johns-Manville's physical examination

EXHIBIT F

program had turned up similar findings and, if so, what Johns-Manville was doing about it.

9. In response, Vandiver Brown stated that Johns-Manville's physical examination program had, indeed, also produced findings of X-ray evidence of asbestos disease among workers exposed to asbestos and that it was Johns-Manville's policy not to do anything nor to tell the employees of the X-ray findings. Vandiver Brown went on to say that it was foolish for us to be concerned and that if Johns-Manville's workers were told, they would stop working and file claims against Johns-Manville, and that it was Johns-Manville's policy to let them work until they quit work because of asbestosis or died as a result of asbestos-related diseases.
10. Thereafter, we contacted Dr. Lanza at Saranac Lake, who was in charge of an asbestos esposure study and we were unable to gather any further advice or information from him.

Owens-Corning "Fiber-glass Itch Documents"

In the early 1940s, Owens-Corning Fiberglas (OCF) Corporation was facing marketing difficulties and objections by the Asbestos Workers (insulators) union. Some of the union members were having skin reactions from handling fiberglass insulation, and there was talk of charging premium rates for using the material. Several steps were taken to overcome "market resistance" to fiber-glass, capitalizing on the greater health hazard of asbestos products.

The company prepared a brochure in 1941 or 1942, featuring a letter from the Aetna Life Insurance Company to OCF Public Relations Manager Edward C. Ames. The letter cited a 35 percent reduction in sickness and hospitalization insurance for OCF's employees. It noted further that OCF was covered by insurance for "Products Liability at an extremely low rate." The lack of any claims on this front was offered as an indication "that there is no hazard in the use of fiberglass or any of its products." On the subject of workers' compensation rates, the Aetna letter said, "(W)e feel the hazard (from fiber-glass) is much less than in the manufacture of Rockwool, Slagwool, Asbestos, or any of the so-called 85% magnesia products." It is not clear how widely this brochure,

YALE LAW SCHOOL
P.O. BOX 401A YALE STATION
NEW HAVEN, CONNECTICUT 06520-7397

HARRY H. WELLINGTON

August 19, 1985

RECEIVED
AUG 21 1985
JOHN W. OLIVER
U. S. DISTRICT JUDGE
KANSAS CITY, MO.

Honorable John W. Olvier
U.S. District Court
811 Grand Avenue
Kansas City, MO 64106

Dear Judge Olvier:

On June 19, 1985, 50 asbestos defendant companies and their insurers signed what has come to be known as the Wellington Agreement. This Agreement, negotiated over approximately three years, established the Asbestos Claims Facility. The Facility is a nonprofit organization designed to provide -- through alternative dispute resolution -- an efficient and equitable means of handling asbestos bodily injury claims. It also will help relieve the strain these claims have placed on our judicial system.

The Facility is strictly a voluntary alternative to the tort system that offers the choice of a negotiated settlement, providing the claimant with the right to return to court up until he accepts the Facility's offer or agrees to binding alternative dispute resolution.

For the Facility to be successful it will require the support of our Judiciary. It is sincerely hoped that the Facility can look forward to your interest and cooperation as it becomes operational.

Although I will not be involved in the Facility's operations, I am proud to have been the moderator of the negotiations that led to its creation and truly believe it will fulfill its promise. The enclosed booklet describes the Facility's operations, claims handling process and membership. It also includes a special telephone number for inquiries. I hope this information on this new resolution process will be helpful to you.

Sincerely,

Harry H. Wellington
Harry H. Wellington
Sterling Professor of Law

STATEMENT OF JAY POWER, LEGISLATIVE REPRESENTATIVE, AFL-CIO

Senator DURENBERGER. Mr. Power.

Mr. POWER. Thank you, Mr. Chairman.

My name is Jay Power. I'm legislative representative with the AFL-CIO. I am accompanied today on my left by Mr. Brian Turner, who is the legislative director of the Industrial Union Department of the AFL-CIO; and on my right Mr. Don Elisburg, an attorney with the firm of Connerton & Bernstein that represents a number of building trade unions and also our industrial unions on the matter of disease compensation, and has played a major role in our internal deliberations in forming the views of the AFL-CIO.

I will attempt to briefly summarize my summary so we can move onto questions.

The AFL-CIO in testimony on a number of occasions before House and Senate committees has stressed that the moral and ethical issue raised by occupational diseases are so serious that common sense tells all of us it is time to resolve this problem for the welfare of those who have already been striken, for those who have been exposed and with future disability, and for those who will be associated with toxic substances at tomorrow's jobsite.

Workplace exposure to toxic substances has taken and continues to take a tremendous toll. Radiation, asbestos, cotton dust, kepone, vinyl chloride, benzidine and a multitude of other agents have all been identified as workplace hazards.

An estimated 25 million workers are exposed to these and other harmful substances. Recent scientific reports show that one out of every four blue-collar workers will die from occupationally related cancers; 200,000 deaths will occur from asbestos alone by the end of the century; 25 percent of all smelter workers exposed to arsenic may die of occupational lung cancer; and 35,000 textile workers have been disabled by brown lung. These estimates only reflect a few well-recognized hazards and do not even touch on such effects as nervous system disorders, reproductive harms, which are now being identified as other possible health problems.

State workers' compensation systems, which were designed to deal with traumatic injury and not disease, have been woefully inadequate in providing compensation to the victims of occupational disease. Only a very small percentage of the most severely disabled by occupational disease receive benefits. And, in the majority of cases, only after litigation. Over 90 percent of those workers who have occupational diseases classified as lung disorders and cancer are forced to litigate their claims before receiving compensation under State workers' compensation systems.

A Federal program is needed to furnish adequate and equitable compensation. Such a program should be comprehensive in scope, covering known occupational health hazards and providing coverage through administrative action for additional hazards as they become known. Such a program should include generous time limits for filing claims, and the program should include presumptive eligibility requirements reflecting the reality that many disabling diseases are caused by work-related exposure to a toxic substance.

The AFL-CIO has long supported the traditional workers' compensation concept of exclusivity vis-a-vis the workers' employers. The certainty of the compensation payment weighed against the uncertainty of traditional common law actions and defenses, has been the cornerstone of State workers' compensation systems for more than 70 years.

There are good reasons for this approach. Experience has shown that where workers have had to seek redress against their employers in the courts, the time consumed has been extensive, the outcome uncertain, and the awards, when they come, often net the worker very little after lawyer fees and costs. The employer also benefits by knowing the extent of his or her liability through the no-fault system.

The AFL-CIO would urge one exception from this approach. Companies should not have the shelter and protection of exclusive remedy when occupational illnesses related to toxic substances are the result of willful and intentional misconduct. Any employer who knowingly and/or willingly exposes workers to dangerous substances or dangerous conditions should forfeit any entitlement to an exemption from common law tort suits. The severity of the occupational disease problem in the United States requires that every means of encouraging preventive action be employed, including the deterrent effect of possible legal action.

Similarly, the traditional third-party worker rights against product manufacturers should not be eliminated by exclusive remedy formulas applicable to employer/employee compensation claims. Potential manufacturer liability has proven to be a major incentive for high standards of testing and production, as well as comprehensive notice of possible hazard. Removing product manufacturers from court liability will strip employees and their employers of much needed protections'.

We have carefully analyzed the approach contained in S. 1265 relating to asbestos compensation against the objectives I have just described. It is our view that many of the provisions of S. 1265 do not comport with those objectives. And, accordingly, we oppose this legislation.

It is our opinion that the needs of workers exposed to asbestos and other toxic substances would better be achieved by the enactment of H.R. 3090, the Occupational Disease Compensation Act of 1985, introduced by Congressman Pat Williams of Montana on July 26.

We commend this proposal to the committee as an effective way to meet the challenge of occupational disease compensation. As part of a compensation comprehensive Federal response to the problems of occupational disease, companion legislation must also be adopted to identify, notify and diagnose workers who are at a high risk as a result of an occupational health hazard.

The National Institute of Occupational Safety and Health, NIOSH, should be authorized to carry out medical research to isolate occupational diseases and to assist populations at risk.

We believe that H.R. 1309, the High Risk Occupational Disease Notification and Prevention Act, introduced by Congressman Gaydos and Chairman Hawkins, represents a significant step toward addressing these issues.

In conclusion, Mr. Chairman, my testimony summarizes the AFL-CIO's views on the pressing need for comprehensive legislation covering occupation diseases. Attached to my testimony are more detailed statements prepared by the AFL-CIO's Building and Construction Trades Department and the Industrial Union Department. The two departments and the AFL-CIO are in full agreement on our proposed remedy for this growing national problem. I would request that the statements of the Building Trades and the Industrial Union Department be considered as part of the AFL-CIO testimony, and included in the record.

Thank you, Mr. Chairman. We will be prepared to answer any questions you might have.

Senator DURENBERGER. Without objection, the additional testimony will be made part of the record.

[The prepared written statement of Mr. Power and the statements from the Building and Construction Trades Department and the Industrial Union Department follow:]

85-42

TESTIMONY OF JAY POWER,
DEPARTMENT OF LEGISLATION
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE SUBCOMMITTEE ON HEALTH
OF THE SENATE FINANCE COMMITTEE

September 9, 1985

Mr. Chairman and members of the committee. The AFL-CIO is pleased to be here today to present our views on occupational disease and the need for a federal program to compensate workers and their families for death or disability resulting from work-related exposure to dangerous substances.

The AFL-CIO in testimony on a number of occassions before House and Senate Committees has stressed that the moral and ethical issues raised by occupational diseases are so serious that common sense tells all of us it is time to resolve this problem for the welfare of those who already have been stricken, for those who have been exposed and risk future disability, and for those who will be associated with toxic substances at tomorrow's job site.

Mr. Chairman, we appreciate this opportunity to offer your committee our concerns about occupational disease and our suggestions for an appropriate course of action for the federal government. All of the interested parties to this issue -- millions of workers and their families, the manufacturers, employers, the insurance industry, the public at large, and the Congress of the United States -- are and should be involved in a serious pursuit of solutions to the pressing social, economic, legal and political problems that occupational diseases cause our society.

Workplace exposure to toxic substances has taken, and continues to take, a tremendous toll. Radiation, asbestos, cotton dust, kepone, vinyl chloride, benzidine and a multitude of other agents have all been identified as workplace hazards.

An estimated 25 million workers are exposed to these and other harmful substances. Recent scientific reports show that one out of every four blue-collar workers will die from occupationally related cancers; 200,000 deaths will occur from asbestos alone by the end of the century; 25 percent of all smelter workers exposed to arsenic may die of occupational lung cancer; and 35,000 textile workers have been disabled by brown lung. These estimates only reflect a few well recognized hazards and do not even touch on such effects as nervous system disorders and reproductive harm which are now being identified as other possible major health problems.

State workers' compensation systems, which were designed to deal with traumatic injury and not disease, have been woefully inadequate in providing compensation to the victims of occupational disease. Only a very small percentage of the most severely disabled by occupational disease receive benefits -- and in the majority of cases only after litigation. Over 90 percent of those workers who have occupational diseases classified as lung disorders and cancers are forced to litigate their claims before receiving compensation under state workers' compensation systems.

A federal program is needed to furnish adequate and equitable compensation. Such a program should be comprehensive in scope, covering known occupational health hazards and providing coverage, through administrative action for additional hazards as they become known. Such a program should include generous time limits for filing claims taking into account the long latency periods for occupational diseases. And, the program should include presumptive eligibility requirements reflecting the reality that many disabling diseases are caused by work-related exposure to a toxic substance.

The AFL-CIO has long supported the traditional workers' compensation concept of exclusivity vis-a-vis the workers' employer. The certainty of the compensation payment, weighed against the uncertainty of traditional common law actions and defenses, has been the cornerstone of state workers' compensation systems for more than 70 years.

There are good reasons for this approach. Experience has shown that where workers have had to seek redress against their employers in the courts, the time consumed has been extensive, the outcome uncertain and the awards, when they come, often net the worker very little after lawyer fees and costs. The employer also benefits by knowing the extent of his or her liability through the no-fault system.

The AFL-CIO would urge one exception from this approach. Companies should not have the shelter and protection of exclusive remedy when occupational illnesses related to toxic substances are the result of willful and intentional misconduct. Any employer who knowingly and/or willfully exposes workers to dangerous substances or dangerous conditions should forfeit any entitlement to an exemption from common law tort suits. The severity of the occupational disease problem in the United States requires that every means of encouraging preventive action be employed -- including the deterrent effect of possible legal action.

Similarly, the traditional third-party worker rights against product manufacturers should not be eliminated by exclusive remedy formulas applicable to employer/employee compensation claims. Potential manufacturer liability has proved to be a major incentive for high standards of testing and production as well as comprehensive notice of possible hazard. Removing product manufacturers from court liability will strip employees and their employers of much needed protection. Workers and their employers must be entitled to their full rights against such manufacturers for additional damages including pain, suffering, loss of consortium and punitive damages as appropriate.

We have carefully analyzed the approach contained in S. 1265 relating to asbestos compensation against the objectives I have just described. It is our view that many of the provisions of S. 1265 do not comport with those objectives. And accordingly we oppose this legislation.

It is our opinion that the needs of workers exposed to asbestos and other toxic substances would better be achieved by the enactment of H.R. 3090, the Occupational Disease Compensation Act of 1985 introduced by Congressman Pat Williams on July 26, 1985. We commend this proposal to the Committee as an effective way to meet the challenge of occupational disease compensation.

As part of a comprehensive federal response to the problems of occupational disease, companion legislative measures must also be adopted to identify, notify and diagnose workers who are at high risk as a result of an occupational health hazard. The National Institute of Occupational Safety and Health (NIOSH) should be authorized to carry out medical research to isolate occupational diseases and to assist populations at risk. We believe that H.R. 1309, the High Risk Occupational Disease Notification and Prevention Act of 1985, introduced on February 27, 1985 by Congressman Gaydos and Chairman Hawkins represents a significant step forward in addressing this issue.

Occupational disease legislation, to be effective, must not only aid those who are, or will become, victims of toxic substance disease, but must provide a mechanism to prevent exposure to those substances found to cause these diseases. Finally, Congressional action also is needed to correct the injustice of denying compensation to workers for job-related injury and disease on the grounds of "alleged" bankruptcy.

Mr. Chairman, my testimony summarizes the AFL-CIO's views on the pressing need for comprehensive legislation covering occupational diseases. Attached to my testimony are more detailed statements prepared by the ALF-CIO's Building and Construction Trades Department and the Industrial Union Department. These two departments and the AFL-CIO are in full agreement on our proposed remedies for this growing national problem. I would request that the statements of the Building and Construction Trades Department and the Industrial Union Department be considered part of the AFL-CIO's testimony and included in the record of these hearings.

Thank you.

STATEMENT OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

ROBERT GEORGINE, PRESIDENT

Mr. Chairman and members of the committee. I am very pleased to join with my colleagues from the AFL-CIO and the Industrial Union Department to testify on behalf of the Building and Construction Trades Department. For many, many years, construction trade union members, journeymen, and laborers have been aware of the traumatic injuries they could incur due to the dangerous nature of their work. However, in recent years we have also begun to see the emergence of diseases in construction workers caused from exposure to the very materials that they have carried, mixed, formed, cut, shaped, or even removed and repaired. Consequently, our members are becoming more and more concerned with the impact of the conditions of their workplace on their health, as well as their safety. We feel that it is time that we express, along with our fellow trade unionists, our concern about the need for federal legislation to address the problems involved in protecting all workers against exposure to these disease-inducing materials.

I believe that now is the time for everyone concerned about the problems created by hazardous materials in the workplace to accept the responsibility for the solutions to these problems. This acceptance of responsibility inclues identifying the past and present job-site exposures of workers to these hazardous materials. It should also include full and fair compensation to the diseased workers, and elimination of the dangerous work practices that cause exposure to these materials. No facet of our society can be complacent because it has solved its individual piece of the problem. We need legislation that would mandate identification of all potential victims of occupational diseases, and devise a system for early detection of occupationally-related diseases. Such legislation must also make allowances for financial restitution to diseased workers and their families.

This is not a matter of abstract concern to the trade union movement. The need to evaluate and design a comprehensive approach to the identification of present and latent victims of occupational diseases has long been recognized. I also realize that as solutions begin to evolve, the potential for conflicts will arise. This is because there are so many interested parties associated with the problem ----- labor, management, the public, the insurance community, manufacturers, and producers. We all are now aware of the impact of one such disease, asbestos and asbestos-containing products, have had on the health of people exposed to them. The financial burdens from insurance claims, health and welfare services for asbestos exposure victims, and the costs of litigation are now a matter of record. There is a pressing need to identify and provide an intervention which might alleviate the pain and suffering that can follow the incubation of the dread diseases arising from exposure to asbestos and the many other toxic substances that our members find each day in their workplaces.

All of us in construction remember the decade from 1960-1969; more than 40,000 tons of fireproofing material were sprayed annually in buildings under construction. The estimate today is that more than one **million** tons of asbestos materials remain in place aboard ships, in buildings, and in process industries. We know that asbestos dust can fill the air when it is disturbed or damaged. Fortunately, we have promoted the use of better work practices and engineering controls through our apprenticeship and training programs to minimize the exposure during removal or repair of in-place, friable asbestos.

Laborers, Asbestos Workers, Painters, and others are exposed in rip-out work; i could name every International Union in the Building Trades, and I'm sure that those individual unions could provide additional situations of exposure.

Boilermakers, like other craft unions, have lodges or locals that represent workers in an industrial setting; but they have also worked on construction sites where it has been estimated that 10,000 to 20,000 tons of asbestos were applied annually to pipes, boilers and other high-temperature equipment in factories, refineries, and power plants.

We have tried to control the exposure of construction workers to in-place asbestos during rip-out work by encouraging the development of specialty contractors to do this work, and discouraging the use of contractors without experience and knowledge.

Researchers at the Mount Sinai School of Medicine have estimated that 7.5 million construction workers are at some degree of risk in developing an asbestos-associated disease. Within the next 20 years, annual excess deaths from asbestos-related lung cancer just among construction workers are estimated to range from 1,405 persons to 1,893. When other cancer deaths are projected, it adds an additional 1,000 to 1,500 deaths to these totals.

There are also other toxic substances in the workplace, the effects of which must be considered in any legislative compensation program. Not so many years ago, Ironworkers would bring bottles of milk to the job when they were welding. They would drink the milk, mistakenly thinking that it would reduce the nausea they would incur from welding either galvanized steel or steel that had been painted with lead-based paint.

That method didn't work very well, but it is an illustration of the immediate and violent reaction of a respiratory system that is being overloaded with toxic welding fumes. When welding is done in confined spaces by trades like Plumbers and Pipefitters, for example, the toxic atmosphere problem becomes magnified. NIOSH has listed deaths due to respiratory disabilities as the number one cause of death among the occupation diseases contracted by workers.

In the construction trades, Painters are exposed to the fumes of paints and solvents; Roofers are exposed to coal tar pitch and asphalt fumes, as well as solvents; Tile Setters, Plasterers, Cement Masons, Carpenters and Bricklayers are all exposed to mixtures and epoxies from which toxic fumes, dusts and mists can evolve. Laborers handle bags, barrels, boxes, cans, drums, cylinders and other containers which may contain hazardous substances. And all crafts on a construction site can be exposed to airborne toxic contaminants. Ironworkers, Pipefitters and Plumbers cut, weld and heat materials coated with paint and anti-corrosive materials that release toxic vapors. Carpenters, Operating Engineers, Electricians ------ pick any craft in the Building and Construction Trades, and you will find a group of construction workers that has potential exposure to these toxic substances.

It is against this background of danger that a special Building and Construction Trades Department Committee was appointed early in 1983 to study and coordinate efforts with other AFL-CIO departments on all legislation concerning occupational diseases programs. That committee developed several basic questions about such legislation. They are:

(1) How will our members who have been and are potential risks to exposure, gain entry to any system devised to meet their health, economic and social needs, not only for themselves, but for their families when the members are deceased, or worse yet, suffering a "living death"?

(2) What will be the mechanism to identify, label and define the very best procedures and equipment needed to protect those who are presently exposed at their workplace, or those who may face work assignments in the future that will expose them?

(3) How can we insure that such a program will be adequately financed?

(4) How can we insure that such a program will be adequately administered?

(5) How can such a program be designed so that it will become the catch basin for all such future occupational disease problems as may arise, and not be done on a piecemeal basis as we have done in the past, and then only after there has been great suffering by our working people?

(6) How can we insure that the total delivery system will not be outmoded and constantly require upgrading in the future to serve the people who will be dependent on it?

That occupational disease committee report indicated that an occupational disease bill is necessary and will offer an opportunity for substantial improvement over the present situation, and a great deal of opportunity for real progress towards the day that our country will achieve a comprehensive occupational disease program for working people who are disabled or die as a result of an unsafe or a harmful health environment in the workplace. Our comments are offered in this spirit. The testimony of the AFL-CIO in this and other hearings has outlined in detail the reasons why a legislative effort to provide a comprehensive occupational disease act is so critical to American workers. The statement of the

Industrial Union Department has outlined in detail our mutual concern for a legislated "trigger" mechanism that will include additional occupational diseases in a compensation program.

I would like to comment more specifically on the mechanics of financing an occupational disease compensation program. The funding of any proposed occupational disease legislation is of particular importance to both construction workers and their employers. Construction is an occupation with a high degree of mobility. Most of our members work for many different employers during their normal career. Long ago our industry set up multiemployer health and pension funds to accommodate this mobility.

With the long latency periods and multiple exposure problems associated with occupational dieases, we believe that it is essential to have a financing system that will fairly compensate our workers who are made ill and not place the entire cost burden on the "last employer", whose involvement may be minimal. There is serious doubt whether the present state compensation systems can continue to respond to occupational disease claims of the future.

We do not believe that the American public should pay for the workplace disability cause by exposure to toxic substances.

We believe that the responsibility for compensating the workers and their families made ill through cumulative exposures to toxic materials and substances should be placed squarely on those who are responsible for the harm. Any mechanism for paying compensation should place the burden of payment on the manufacturers of the toxic substances. Because of latency and multiple exposure factors, it is appropriate that a compensation fund be created that will have an industry-by-industry orientation.

On July 26, 1985 Congressman Pat Williams introduced H.R. 3090, the Occupational Disease Compensation Act of 1985. A careful examination of that measure will show that the elements for an effective Occupational Disease Comepnsation Program as outlined in the testimony of the AFL-CIO, IUD and BCTD are included in that measure. I commend the Committee to that proposal.

STATEMENT OF THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO

HOWARD SAMUEL, PRESIDENT

Mr. Chairman and members of the committee. On behalf of the Industrial Union Department, AFL-CIO, we are very pleased to be here to discuss some of the difficult problems workers face when they are exposed to toxic substances and processes. We also want to make clear that we support legislation to provide for realistic compensation for those who develop an occupational illness from exposure to these harmful substances.

As stated in the companion testimony of the AFL-CIO, occupational disease is a many-faceted workplace problem. The focus of public attention has been on cancer and asbestos because of the enormous, well-publicized impact it has had on thousands of workers exposed to that substance. Nonetheless, rubber workers who develop leukemia from benzene, plastics workers who develop liver cancer because they must breathe vinyl chloride, miners who die of lung cancer because of ionizing radiation, electroplaters who breathe cadmium fumes and die of prostate cancer--all sicken and die just as easily as men and women exposed to asbestos.

Their suffering and the suffering inflicted upon their families should not be less because their tragedy draws less attention in the media.

Cancer is not our only occupational disease. Cotton dust disease, nerve destroyed by lead, mercury and solvents; all are worthy of our concern.

The problem of these diseases has been the focus of attention in hearings and proposed legislation before this committee on numerous occasions in the last 15 years. It was testimony relating to occupational disease, including testimony concerning asbestos and cotton dust exposure, that was a major impetus behind the enactment of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660) (OSHA). The OSHA Act also created a National Commission on State Workermen's Compensation Laws to study the many problems then existing with state workers compensation programs.

The Commission reported in 1972. In several sessions of Congress following the report, this Committee considered legislation designed to provide a program of Federal Standards for State Workers compensation programs. During each of those hearings.

representatives of organized labor have come before this Committee with overwhelming evidence of the seriousness of the occupational disease problem and the need for some kind of federally mandated program to provide adequate compensation to workers who fall victim to diseases after exposure to toxic substances. Thus far, legislation has not been enacted.

We believe that Congress has substantial information before it from its prior investigations to recognize that the effects of toxic processes and substances on workers health must be the subject of a fair and equitable compensation scheme. A legislative solution must include coverage for those known toxic substances and processes for which populations of workers and bystanders for whom excessive rates of occupational disease have been identified; and, also include a mechanism for coverage of additional affected populations as they are identified. It is important that the latter mechanism be reasonably well-defined. Our experience with rule making for toxic substances and processes under other statutes, e.g. OSHA and Toxic Substances Control Act (TSCA) has shown that promulgation of effective standards is seriously hindered absent specific statutory Congressional direction.

A number of major considerations are involved. First, any legislative direction has to make clear the executive agency's responsibility to promulgate a suitable regulation in a specific time frame. Workers cannot become caught in the cross-fire of inter-agency disputes and suffer long delays in obtaining relief. For those populations already recognized outside of well documented occupational diseases such as asbestosis and cancer from exposure to asbestos, byssinosis among cotton textile workers, and benzidine-induced bladder cancer, the Congress should provide the necessary standards, or set a maximum time limit for coverage of diseases and workers under any legislation.

Second, in addition to specifying certain known diseases as qualifying for compensation, legislation should direct the executive agency to identify coverage of additional discrete occupational diseases and populations at risk of occupationally attributed disease which consider duration and intensity of exposure, specific diseases and specific areas or organs of the body to be covered, and the required medical determinations to be considered.

We believe that it will not be difficult for appropriate agencies such as NIOSH to make determinations for populations of workers exposed to toxic substances and processes that reflect the increased burden of risk of these workers developing occupational disease. Those who have borne this risk and developed cancer or other diseases because they are coke-oven workers, welders, textile workers, uranium miners, painters or oil refinery workers are no less entitled than workers with more well known occupational diseases to compensation.

Mr. Chairman, this is no wishful thinking about problems down the road. As is amply shown in my colleagues' testimony this morning, there are afflicted workers and their families who need help now. There are a number of high-risk populations which should be covered in legislation as passed, or certainly included within a short period of time after passage of any bill.

II

Let me now turn to a more specific explanation of the mechanism for including a particular toxic substance or process in a compensation scheme.

The existing state workers' compensation systems have failed to fairly compensate, usually to compensate at all, victims of occupational disease. It is important to know why this is the case.

One reason the compensation system has failed is because two fundamental concepts essential to understanding disease have not been adequately reflected in law.

The first concept is that disease cannot be explained in terms of simple, single causes and simple, single effects. The causes of disease are many and complex. So are the associated effects. Because most of us have this simplistic idea in mind when we use the term "cause," there is a growing consensus among scientists that the term should no longer be used either in scientific or lay publications. They suggest the term "risk factor" instead.

The second concept has been called "population thinking." This is a way of understanding each of us by looking at populations, that is groups to which we each belong because of some shared characteristic (such as our job or exposure to a toxic substance).

This kind of thinking has shaped the information we have received from the scientists in modern times. Statistical methods have become very important in gathering and analyzing the information as it comes to us, but few laws or proposed laws have been written with this reality in mind.

Whether we are struggling with the problems of causation or trying to understand what occurs in a population, we have to deal with information as the scientists gives it to us. We must not ask that it be twisted to fit obsolescent language in our laws. Instead, we must change the law to fit the current state of science.

Compensation law has not been totally insensitive to these understandings. Thus, the terms "due to," "arose out of," "but for," and "the cause" usually found in compensation law should be retained only if they have been clearly qualified. One way this has been done traditionally is by the use of "presumptions."

Used fairly and consistently, presumptions defined and utilized within a compensation system will reduce reliance on the tort system. They bridge the gap created by the uncertainty characteristic of scientific investigation and the ethical certainty that just claims, i.e., claims for disability and death more likely than not attributable to the workplace, must be paid.

For example, it is appropriate to create a presumption that asbestosis is caused by breathing asbestos because the typical scarring of the lung and calcification observed by the physician is found among significantly large numbers of exposed workers. The chance is very small that an excessive incidence or prevalence of the same conditions can be found in populations of workers in the absence of asbestos exposure.

A similar presumption is warranted for mesothelioma. Mesothelioma has in fact been associated with other fibers and, in animals, with some chemicals. But except for these rare circumstances, the cases studied have been associated with asbestos exposure at work or among the families of asbestos workers and other bystanders.

In the case of asbestosis and mesothelioma, a burden of risk of disease was added by the asbestos exposure for each and every worker in the population, even though the majority of those in the exposed population do not develop the disease. The size of the added burden varies, for example, with duration, extent and age at onset of the exposure, plus other environmental risk factors. Where the environmental factors are the same, the added burden of risk attributable to asbestos is the same and distributed uniformly throughout the entire group of workers. Other factors determine whether and when a worker actually becomes ill.

The principle of added burden of risk must be applied consistently. There are no special rules of nature that set mesothelioma, for example, apart from cancers found at other sites.

Among asbestos insulation workers, regardless of personal differences such as whether they smoked or not, the risk of lung cancer associated with the exposure was more than five times the risk of lung cancer found among workers not exposed to asbestos. The added burden of risk is the same for the entire exposed population--even though the entire population will not contract lung cancer--and, therefore a presumption is justified for those that do contract lung cancer.

The same case can be made for asbestos-exposed insulation workers who suffer from cancer at other sites (oropharynx, larynx, gastrointestinal tract, ovary, or kidney).

There are no special rules of nature reserved for the effects of asbestos. The principle of the added burden of risk applies to all of the toxic substances and processes and the analysis of the same.

A systematic way must be required to assess risk for all populations of workers, a generic approach to trigger all identified populations with a high risk of occupational disease.

We believe that the "trigger" has these elements:

1. An agent, process, or job found toxic from (a) observation of human populations or (b) animal and laboratory research.

2. Estimates of significant excess risk (30% or greater) of death or disease in specific areas or organs of the body (site specific) in the populations exposed to the agent, process or job.

3. Based on evaluations of (1) and (2), the appropriate agency makes a determination that a significant, elevated risk has been found in a population for workers who have (i) established membership in the population, (ii) have manifest disease, and (iii) experience sufficient exposure approximating that which results in a risk of disease in excess of 30% compared to similar workers without exposure and, that such exposure to such toxic substance or process is compensable under the legislated program.

The 30% benchmark is utilized for the imposition of the "trigger" because it is a level of risk for which the statistical data is available and widely accepted as reflecting an added burden of risk attributable in the workplace and therefore a burden of risk for which compensation should be paid.

We believe the essential requirements of an effective occupational disease compensation program have been embodied in H.R. 3090 and we join with the AFL-CIO and Building and Construction Trades Department in commending the provisions of that measure to this Committee for its consideration.

III

We would like to make clear that our interest is not just in compensation alone. The basic process of risk assessment useful in a compensation scheme is also important and has application in the reduction of suffering and death.

One of the most important realities repeatedly established for environmentally induced chronic disease is the long period of latency between the onset of effective exposure and the first evidence of the disease. This "silent period" between initial exposure and the discovery of disease is of more than theoretical interest. It offers an opportunity, a possibility that intervention during this time might be successful in breaking the chain of events between exposure to an agent and the onset of uncontrollable disease. For cancer alone, the American Cancer Society estimates that nearly a third of the expected deaths could be prevented by existing clinical methods of early detection and treatment. There is even some evidence of reversing the development of disease before it is found when the exposure has been stopped. Consequently, an integrated program of early detection is an urgent need including the identification and notification of high-risk groups, resources for the diagnosis and verification of disease effects, community and family resources for continuous and lifetime surveillance, and referral and counseling. In this regard, we commend the Committee's attention to H.R. 1309, the High Risk Occupational Disease Notification and Prevention Act of 1985 introduced on February 27, 1985 by Congressman Gaydos and Chairman Hawkins.

That bill provides the following steps for dealing with preventive intervention for workers at high risk:

1. Expands the federal research effort, coordinated by NIOSH, to identify and define worker populations at high risk of contracting environmental or occupational disease.

2. Authorizes NIOSH to establish a set of federal criteria for environmental health centers staffed and equipped for medically screening, monitoring, and counseling individuals in high risk populations. Such centers will be located and organized in existing community health care facilities, and provided with short-term professional staff education.

3. Creates a federal program to notify individuals within high risk populations that they are at risk because of an environmental exposure, and to refer them to environmental health centers that meet federally recommended criteria.

4. Requires private or public health insurance or other medical care programs to eliminate occupational exclusions in order to maintain existing benefits and entitlements covering examinations of high risk individuals who are notified by the federal government.

5. Establishes a strict set of worker and other individual protections against 1) employer discrimination on the basis of identification of being at high risk, and 2) abuse of genetic and other medical data.

We believe that these elements are essential to an effective program of occupational disease prevention. We cannot focus totally on compensation without bringing to bear an understanding of this need as well.

Mr. Chairman, the Industrial Union Department joins the AFL-CIO and the Building Trades Department in underscoring the importance of enacting appropriate legislation at the earliest possible time. The evidence of the harm has been amply demonstrated in previous hearings before this and other Committees. There is no longer a question of Congress determining that we have a problem. The asbestos catastrophe alone demonstrates the need. The work before the Congress should be to develop and enact a workable solution. To that end we stand ready to assist this Committee in any way possible.

Senator DURENBERGER. Mr. Power, I just want to make sure I understand what you are saying here. That the AFL-CIO has traditionally supported both occupational safety and health legislation. In terms of remedies for occupational safety, I understand it has been the traditional position of the AFL-CIO to support State financed remedies through the workers' compensation system; is that correct?

Mr. POWER. That's correct, Senator.

Senator DURENBERGER. With regard, however, to occupational health, I understand the position of the AFL-CIO to be different than that. That there is suggestion in your testimony that we need to consider a federally financed and a federally operated or nationally operated occupational health reimbursement—for occupational disease, I should say. A reimbursement system. Is that also correct?

Mr. POWER. Yes, Senator. The AFL-CIO believes that the State systems have been traditionally quite good at covering the injury side of worker health and safety. If a construction worker falls off a ladder and is injured, the system usually works in an efficient manner to give that worker a fair compensation. However, it is our view that there is overwhelming evidence that the States simply have not met the problem of occupational disease, and adequately compensating workers who have such diseases, because of latency periods and other factors.

And in all of the legislative proposals pending in Congress at this time, it is our view that trying to work through the State systems in the matter of compensating fairly occupational disease simply won't get the job done. That there ought to be a comprehensive Federal program to address this problem that is operated at the Federal level. We already have a longshore and harbor workers' compensation Federal program. It has operated for many years. The black lung program is operated. We simply think if we really want to solve this problem that attempting to address occupational diseases through the 50 States with 50 different laws and bureaucratic procedures is really an impossible task, and we think the Federal answer is in order.

Senator DURENBERGER. The way the occupational injury or the safety side works through the workers' comp system, I assume in most States, is first through an administrative process. Then at the end of that, with an appeals process by which a party can go into a court system; not a trial on its merits, I don't imagine.

Mr. POWER. Well, it's usually the case. Both of my colleagues—we have testified on this matter. I think this is our third time. I want to give Brian Turner a chance to answer your question.

Mr. TURNER. The key point, in response to your original question, Senator, is that something like 90 percent of people who are disabled as a result of occupational disease get nothing out of the State workers' compensation system. There are denials of casuality. There was a recent headline a couple of months back where the State of Virginia declared simply it was not going to give any coverage to people who come down with diseases after they have left the worksite, which is exactly what we are talking about here.

There is a crisis that applies in virtually every State in dealing with long leadtime, chronic diseases that arise out of workplace exposures.

Senator DURENBERGER. What is the recommended—if you have been at this three times, you can very quickly get the point of my second question, which is what is the recommended national process? Is it administrative? Is it part of the litigation system? What is it?

Mr. TURNER. We would like to see a Federal workers' compensation system for victims of occupational disease; that where there is a scientific link between a certain threshold of workplace exposure and the later onset of disease. Where the risk of that disease is substantially elevated because of the workplace exposure, then the people who get those diseases and are disabled would be compensated. The number of diseases on the list and the kinds of exposures would be determined by scientific research, as Jay indicated, at the National Institute of Occupational Safety and Health.

Senator DURENBERGER. Where does S. 1265—in that it in effect caps the remedies. It does not permit proof of willful conduct.

Mr. TURNER. In two regards, sir. First, in that it covers just asbestos victims. If the numbers that Dr. Selikoff and others have produced indicate that something like 200,000 excess deaths will occur between now and the end of the century as the result of asbestos exposure, the same numbers tell us that 100,000 people are dying every year as a result of all occupational diseases. And we think it's a procedural mistake to carve off just that one segment which has gotten the appropriate public attention and to leave aside all those other victims.

Don Elisburg could address the procedural aspects of the bill, I think, much better than I.

Mr. ELISBURG. To go back to your first question, Senator——

Senator DURENBERGER. Are you going to cover all three questions for me? [Laughter.]

Mr. ELISBURG. No. You had asked the question of what is the Federal procedure that we had proposed. And, indeed, it would be effectively an administrative procedure of a traditional workers' compensation-type process, with an administrative process, appeals board, and ultimately a review on the record in the courts, which is rather standard. It does embody the no-fault concept vis-a-vis the employer and the employee, with the exception of those special situations where there might be, we feel, the equivalent of an intentional harm where you could then proceed tort wise against the employer.

That is not to say that we would exclude third-party actions against manufacturers.

Senator DURENBERGER. You would not exclude third-party actions against a manufacturer?

Mr. ELISBURG. Right. That is, we see that the relationship between the employer and the employee is a different relationship than that between the employee and the manufacturer. Although we do suggest that in the event there would be a third-party action, that the workers' compensation would act as an offset against that.

Senator DURENBERGER. Senator Armstrong.

Senator ARMSTRONG. Thank you, Mr. Chairman.

Mr. Motley—am I pronouncing your name correctly? Is it Mootley or Motley?

Mr. MOTLEY. Motley, sir.

Senator ARMSTRONG. Well, Mr. Motley, I would like to start just by being sure I understand where you are coming from. You are a practicing attorney and represent plaintiffs in these cases, along with, I guess, other kinds of cases. But have you represented a lot of them?

Mr. MOTLEY. Yes, sir.

Senator ARMSTRONG. How many?

Mr. MOTLEY. How many have I brought to trial or how many do we represent?

Senator ARMSTRONG. Well, both.

Mr. MOTLEY. We've tried approximately 70 cases.

Senator ARMSTRONG. You've tried 70?

Mr. MOTLEY. My law firm, yes, sir.

Senator ARMSTRONG. And how many claimants have you represented?

Mr. MOTLEY. We currently represent approximately 4,000 victims.

Senator ARMSTRONG. About 4,000?

Mr. MOTLEY. Yes, sir.

Senator ARMSTRONG. What's the status of those other cases? Are some of them still pending?

Mr. MOTLEY. Yes, sir. Currently, the situation, laying aside the uncertainty surrounding the Wellington situation, the cases normally, from the time of filing to partial settlement, is about 6 months so that the victim has some partial compensation approximately 6 months or less after the case is filed. Most of the cases now are being handled through their completion, laying aside the Manville situation because they can't be sued of course, is 2 or 3 years.

Now in some jurisductions, Illinois, for example, it could be 5 years. Some jurisdictions are 6 months. But I would say on the national average it is 2½ to 3 years.

Senator ARMSTRONG. How many of those 4,000 cases will really be tried?

Mr. MOTLEY. It's not unlike automobile accidents, sir. There are 100,000 automobile accident cases filed every year, and less than one-tenth of 1 percent are tried. In the asbestos arena, I would say approximately, right now, 1 percent will end up being tried. And when you say "tried," I assume you mean tried to a jury with a verdict.

Senator ARMSTRONG. Right. Some of them will be settled?

Mr. MOTLEY. Yes, sir. All of them will be litigated. It's not like an administrative process where everyone is treated the same. Every person is an individual, and I think it's a testament to the jury system, although Mr. McKinney didn't like it, that five juries would hear testimony and give five different people five different verdicts. That's what it's all about. Perhaps the person who lost didn't deserve any money. He might not have had an asbestos-related disease.

Senator ARMSTRONG. It's a little hard for me to understand that point. If in the end most of them are settled anyway, it's more the threat of the ultimate jury trial than the actual jury trial itself that——

Mr. MOTLEY. The asbestos companies have a very sorry track record in front of the jury, sir. And punitive damages are awarded regularly for their outrageous conduct. And I'm certain that they are concerned about that fact. Indeed, part of the provision in the Manville settlement proposal is a payment of punitive damages for current victims in recognition of their past outrageous conduct.

Senator ARMSTRONG. But I thought the point you were making was that the juries will look at different cases and award different amounts in cases that have varying circumstances.

Mr. MOTLEY. Yes, sir. That's how the system works.

Senator ARMSTRONG. But that's only in the ones that actually go before a jury.

Mr. MOTLEY. Yes, sir.

Senator ARMSTRONG. But in other cases, that same result may be accommodated through the settlement process.

Mr. MOTLEY. Sir, just like anything else, there is an experience factor. In a particular State, if I might use Florida—in northern Florida, enough cases have been tried so that both sides of the victims and the asbestos companies and their insurers know what a given range of a verdict might be. And settlements are negotiated within that range. The individual has the right, of course, to reject that settlement. There's a gentleman in Chicago who outright rejected an offer. He is dying of lung cancer. And he went to trial to show the jury how mad he was and the jury awarded $800,000. And he said he wanted his day in court, which is his constitutional privilege, of course.

Senator ARMSTRONG. Your point, then—because I do think we need to understand this—is that by bringing to trial a large number, though a small percentage, of such cases that norms are established which permit a settlement process without the other 99 percent actually going to court, but taking into account the probable outcome of those jury trials.

Mr. MOTLEY. The range of outcome, sir, with the victim, of course, having the final decision as to whether or not he accepts that or exercises his constitutional right to a jury trial.

Senator ARMSTRONG. I understand.

Just while we are on the subject—and then I want to move to some other matters—somebody, I think maybe it was the Rand Corp., indicated that there is something like $25,000 in attorneys' fees on the average for these cases. Is that a pretty close estimate? Or are you familiar with the Rand Corp.?

Mr. MOTLEY. I'm familiar with the study that was undertaken by the Rand Corp. I don't know where they got some of their figures from. The figures which have been cited by the asbestos industry are misleading because most of the money that is spent on litigation costs are spent by the asbestos companies in their desperate attempt to defend themselves, which is their constitutional privilege also.

Most of the claimant attorneys operate on a contingency fee basis. Most of the workers can't afford to pay $250 an hour for lobbyist and lawyers. And, therefore, they have to go to court on the contingency system. And most of the contingency fee—we are not regulated by statute, a court rule. And in some States they are regulated. That would be approximately 30 percent of the recovery. If there is no recovery, 30 percent of nothing is nothing.

So I cannot answer your question if the average case is $25,000, because some cases end up with a settlement value or a jury verdict of nothing. So I don't that anybody has ever taken the cases that ended up with no recovery and averaged those against the cases that have had a recovery and come up with an adequate answer for your question.

Senator ARMSTRONG. Well, this is completely beyond my range of experience. and so I have to rely on you as an expert in this.

Mr. MOTLEY. I'm an expert at losing cases.

Senator ARMSTRONG. Well, it doesn't sound like it. It sounds to me like you are winning most of them. That's what you said a moment ago.

Mr. MOTLEY. Well, the victims——

Senator ARMSTRONG. The companies didn't win very many.

Mr. MOTLEY. No, they don't, but that's not necessarily because of the lawyer skills.

Senator ARMSTRONG. Here's the thing I want to——

Mr. MOTLEY. It might be in spite of.

Senator ARMSTRONG. Here's what I wanted to pin down. Is in general is the $25,000 a case way too much or about right or is it less than that?

Mr. MOTLEY. I have no idea, sir. If you request it of me, I could see if our files would permit me to average what the average case, when you factor in the cases that have no value—if you throw in—excuse me, not throw in, but include in the mix the cases that have no value, I would think it is tremendously less than that.

You must understand that of there are 4,000 cases, that doesn't mean 4,000 people get a recovery. Some of those cases end up after investigation where the person won't have an asbestos-related disease.

Senator ARMSTRONG. Well, I do think that would be useful because one of the issues that is raised in support of this general idea is that a disproportionate share of the total resources devoted to solving the problem end up in the hands of the lawyers. Now I'm not to start off down the line in making the lawyers the whipping boy of the problem. That's one thing that lawyers and Senators have in common, is that they are often criticized and we are both getting enough criticism without my adding to it.

But it does appear to me that that's a legitimate question. It's the contingent that has been brought before this committee, and if it is correct, that a huge proportion of the total cost of settling these claims goes to attorneys rather than to the victims, then it is, it seems to me, a proper subject of consideration at least.

Mr. MOTLEY. I think you should address that question, sir, to the victims and not the lawyers or the companies. The companies certainly would be delighted to see the victims without representation. If the victims didn't have representation, the companies wouldn't be in chapter 11 proceedings. And I think that ought to be properly addressed to the victims. Ask them whether or not they think their right to select their lawyer and pay him how he chooses ought to be intruded upon by the Congress.

Senator ARMSTRONG. Mr. Chairman, one other question I would like to raise.

Mr. Motley, it's the contention of at least some segments of the industry that if we enact no legislation and simply let the present scenario play out to its logical conclusion, the effect will be that the industry will be liquidated; that people who file claims now will in many cases be generously compensated or at least compensated in large dollar amounts; and that then when the companies have been liquidated for that purpose, that subsequent claims would not be paid simply because there wouldn't be anybody left to sue. Do you share that feeling?

Mr. MOTLEY. No.

Senator ARMSTRONG. And do you feel any legislation is needed or should we just let things go on as we are?

Mr. MOTLEY. Sir, there are certain areas that certainly there need to be some reforms enacted. And I think the AFL-CIO has correctly pointed out the inadequacies of the State workmens' compensation remedy for occupational diseases. That's certainly something that needs to be remedied.

As far as whether or not the funds will be exhausted, so far the funds have not been exhausted. And projections of the Manville Corp., if correct, will be that the victims present and future will be paid out of their insurance proceeds and the profits of the company.

You must keep in mind—while I'm not going to debate who is at fault, but asbestos occurs naturally, but it was taken out of the earth and placed in products and sold for profit by the Manville Corp. and others. And the way the free enterprise system works, if I understand it correctly, is that there is a day of reckoning and that day of reckoning has come.

There must be a concern, of course, as to whether or not the victims down the line will receive compensation. But I've seen no indication, and I'm involved in the negotiations, that there won't be an adequate amount of money for the victims in the future. The victims will own the corporation. And the corporation that is currently making a profit and it may or may not need new management—that's a matter to be decided when the new owners take over the shop.

Senator ARMSTRONG. Mr. Chairman, I regret to take so much time, but one last question.

In your opinion, does the Government have a moral obligation to pay a portion of these claims?

Mr. MOTLEY. You are asking me?

Senator ARMSTRONG. Yes. I think Mr. Power has already testified to that. That's why I wanted your view.

Mr. MOTLEY. Let me say this: I do not think that any employer has the right to withhold information from an employee that affects his life. I, too, have read some of the documents that Mr. McKinney talks about, and a fair reading of those documents would indicate at that time, at that place with that particular person he did shirk that responsibility. Now the question is: Should the U.S. Government compensate victims? They are currently compensating victims.

Where I would respectfully ask this committee to address its attention is—I think it's somewhat incongruous that the U.S. Government would pay a worker under the longshoreman's benefit, which they indirectly end up paying, or under the Federal Employees Compensation Act, and then demand that the employee give the money back to the Government when it goes out to the party that is responsible for producing products for profit which caused his injury. Because right now if an employee doesn't recover under FECA or longshoreman-harbor workers' compensation, he must return that money to the Government, compensate them again. If he's injured on the workplace and the Government follows in its duty to protect its employee, he should be compensated.

But the Government should not reap the benefit of their own misdeeds by not protecting their employee. When he goes after the company that produced the product that caused him the harm, the poison that poisoned him, the Government should not be entitled to get that money back. And I would respectfully ask the Senate committee to investigate that particular aspect. And that would be very simple. Just abrogate the liens that the Federal Government now enjoys for third-party actions when a third-party action is successfully prosecuted against the manufacturer of a poison like asbestos.

Senator ARMSTRONG. Did you understand my question?

Mr. MOTLEY. Perhaps I didn't.

Senator ARMSTRONG. Did you answer?

Mr. MOTLEY. I think I did. I'm opposed to what you and the asbestos companies propose in S. 1265. Yes, sir.

Mr. POWER. Senator, I wonder if I could just expand on that.

Senator ARMSTRONG. Mr. Power, if you will just give me just a moment.

Mr. Motley, I have rarely in the years I have been in the Senate attending meetings like this, rarely have I met anybody who seemed to have as much of a chip on their shoulder. And you haven't got any reason to pick a fight with me.

Mr. MOTLEY. I didn't know I was, sir. And if you think I am, I apologize.

Senator ARMSTRONG. Your statement makes it very clear that you are. And your attitude does.

Let me just tell you that in my statement of introduction of this bill with which you made a point of disagreeing, I said I was introducing a bill drafted by a bunch of the companies in order to gain other opinions and to provide a basis for discussion. You really don't have any fight with me unless it is that I want to somehow reduce the amount of the resource devoted to the legal profession and maybe get more of it into the hands of the victims.

I don't even know that we are in disagreement about that. You haven't said that.

But let me try one more time. The central question or one of the central questions here is whether or not the sovereign immunity, which evidently protects the Government from having to pay these claimants, ought to, in some way, be waived or otherwise altered. In other words, does the Government have a moral obligation to contribute to the cost of paying the claimants? And I was just asking your opinion. It's a value judgment. It's a question of moral responsibility and not even a legal issue at this point.

Mr. MOTLEY. I thought I answered it, sir. And I apologize if you didn't think I did. I said I thought any employer has a moral obligation to compensate his employee, if he's injured on the workplace where he has a duty to protect him. I thought I said that.

Senator ARMSTRONG. You are including in this case the Government?

Mr. MOTLEY. The Government is compensating people who were employed in Federal workplaces through the LHWCA and the FECA, sir.

Senator ARMSTRONG. Thank you. Let's be friends.

Mr. POWER. I wonder if I could amplify the position of the AFL–CIO on this.

Senator ARMSTRONG. With the indulgence of the chairman. I've gone over my time, but, sure, I would be eager to hear it.

Mr. POWER. I think President Carlough put it well in the questions that you and Senator Durenberger asked him about did the Federal Government play a role in causing this problem.

I think the time that you have raised the question, the highlight of that in your bill and the bill in the House side have often missed the point of the consequences for the victims of this. I'm a working lobbyist. I work on the Hill. I talk to Members of Congress. We try to work out legislation. It seems to me that if the time ever comes that there are markups either in this committee or over in the House Educational Labor Committee on various pieces of legislation that the Federal role will either work out or it won't.

There are people and Members of Congress who believe it. There are others who don't.

It seems to me that——

Senator ARMSTRONG. And some of us who are still trying to develop our attitude toward that. I'm disposed to think the Federal Government does have such a responsibility. But the purpose of this hearing, in part, is to elicit that kind of advice.

Mr. POWER. Well, Senator, there are two things that could happen in the real world of a marking up of an actual bill that we at the AFL–CIO are concerned about. Because we are not afraid of the legislative process in this area. We would like to see it move forward. For as many Members of Congress who may be sympathetic to an argument that the Federal Government played a role, there are just as many Members of Congress that don't want another entitlement program. And let's face it, I think the last entitlement program was passed by Congressman Phil Burton to compensate workers for the Redwood National Park in 1978. And we don't think that a lot of Members are ready to spend Federal money with $200 billion deficits.

One of the reasons we are very pleased that Congressman Williams introduced his bill, which we worked with him on, is that we hope that the Williams bill will refocus some of the debate away from the poor companies and their third-party suits and whether or not the Federal Government played a role; to refocus debate on the workers, whether union or nonunion, and the victims, to set up a plan that actually compensates them fairly, and a system that actually works.

Half the law firms in town are working for these companies. Half the former officials of the Carter administration are lobbying for these companies. They come to the AFL-CIO daily looking to lock us in a room and come up with an answer.

The focus of the Congress on this issue should get off the Federal Government and get onto the victims.

Senator **Durenberger**. I hate to prolong this.

One of the next witnesses is going to talk about the inequities, the cost and the unjustice in the current tort litigation system. And he is going to say that a high proportion of awards go to individuals in whom evidence of the disease cannot be demonstrated. He's going to say that one of the main deficiencies in the approach is that it distorts medical evidence calling, for instance, for proof when, in fact, medical diagnosis is more often hypothesis. That is, the best available explanation given the facts about the case. He will say the failure to rely on objective medical evidence in individual cases, as in mass settlements. He will say, further, that medical experts may be chosen not for their expertise and objectivity, but because their testimony will support one side or the other.

I could ask this question of both of you, but I will start with Mr. Motley in terms of your experience. My concern, of course, is that's kind of the way the workers' comp system has worked in a whole lot of cases. And I tried a bunch of those cases. And you are up against a 10-percent disability. You go find the doctor that will find you 50 percent. He's in and out of court. He's in and out of that hearing every day with a different lawyer and a different victim.

Mr. Motley, what do you have to say about that critique of the current litigation system? And, in particular, let me focus you on the medical evidence. I wonder if there are a lot of medical experts around who have, you know, both the ability in terms of the research area, plus the ability in the clinical area to determine cause and effect relationships. Why don't you just tell us a little bit about what you are seeing out there.

Mr. **Motley**. Senator, it's a very difficult area because you are dealing with a disease—and I assume you are reading from the statement of Dr. Weill?

Senator **Durenberger**. Right.

Mr. **Motley**. It's a disease that I'm sure the doctor will say that he's much more expert at talking about than I am, but having had some experience in trying these cases and going to medical seminars, it's an area—asbestosis is a disease that is only caused by asbestos. Unfortunately, unless you have surgery and some tissue to look at, it's a disease that can look like other diseases.

I think that in the last 10 years, through the efforts of the American Thoraxics Society, NIOSH and particularly Dr. Selikoff, and others, there has been an increasing development of expertise by pulmonary physicians and occupational physicians in this country and the ability to objectively, to the extent that asbestosis can be objectively diagnosed absent tissue; come up with those diagnoses.

The other major problem we have is lung cancer, which is caused by a number of things. And in regard to asbestos workers, it's generally caused by the confluence of the factors of cigarette smoking and asbestos exposure. So that you have a situation where doctors are of different opinions. Some of them will say it's the cigarette smoking that did it. Some of them will say it's the asbestos that did it. You will find some doctors that won't believe that anything causes lung cancer but cigarettes. And you will find some on the other hand that believe the cigarettes, believe it or not, don't cause lung cancer. And both sides as part of the litigation process seek out those experts who identify more closely with their issue.

Senator **Durenberger**. What are the numbers? Are there three guys on one side and three on the other and all they do is spend—well, Dr. Selikoff couldn't be here today because he's making a speech down in Houston. What is the reality?

The world is not full of experts who can make this connection unless they are doing it for a large feee What is going on out there? Three guys on one side and three on the other? A million on one side and a million on the other?

Mr. **Motley**. No, sir. In our State of South Carolina, for example, my home State, there are at least 100 physicians who have diagnosed asbestosis-related disease in the last 10 years and who have been found competent by courts to testify. And you normally—the asbestos companies, which is their right, will have a person examined by a person, a teaching pulmonary physician, and those teaching pulmonary physicians are quite capable and competent to diagnose.

I don't think it's a problem of enough people diagnosing, being able to diagnose. I think it's a problem that the medical profession might have with delineating finely enough the criteria upon which that diagnosis is based. But that's the way it is with black lung. That's the way it is with any occupational lung disease because there's not, absent surgery or the ultimate surgery, the autopsy, there is no way in life to absolutely be 100 percent certain that a person has asbestosis.

I think what Dr. Weill was talking about, if I understood—and I haven't seen his statement—is that the system is skewed because people who aren't currently disabled are getting compensation. I believe that's part of his statement. I didn't know if you wanted me to respond to that or not, since you read it.

Senator **Durenberger**. That's fine.

Senator Armstrong explored the cost on the side of the legal profession. What is the current reality out there today in terms of the costs that are going into the medical side of all of this? Are we building up some professionals out there who are making substantial livelihoods in the medical professions testifying just on these cases? And, if so, what kind of a cost contribution do they make for each of these cases?

Mr. **Motley**. Senator, there are in litigation, as you know, as you pointed out, there are people, apostles for one side and the other, who do make money off the litigation. There are consultants to industry who testify on numerous occasions before this body and other bodies who I am certain charge for their time. Which is their right to do. But I don't believe that if you took all the money that people who are apostles for one view or the other, that you are talking any large percent at all. It's not like maybe—you mentioned malpractice earlier. There are traveling cottage industries that go in and will testify, and that might be a problem or might not. But I haven't seen that in the asbestos cases. There are 10 experts who testify for the plaintiff on issues that are generic. That is, as the Senator pointed out, who knew what when and what do they do about it. Historical witnesses. People who were there. They testify a lot, because they were there and they are fact witnesses essentially.

And you have certain pathologists in specialized forms of cancer who are called upon to testify. But if you just take the asbestosis case itself, I don't see people trooping in and out of the courtroom on a regular basis on the issue of diagnosis alone. I think local doctors are diagnosing the conditions. The teaching doctors might disagree with them, and then the plaintiff brings in a teaching doctor who agrees with them, but they are not traveling around the country on that issue, sir.

Senator **Durenberger**. What percentage of your 7,000 cases are asbestosis and which are——

Mr. **Motley**. 4,000. Senator, I will be glad to try to find that out for you. But if you want an estimate, I would say that 80 percent are asbestosis and 20 percent are various cancers. There are more than one cancer involved with asbestos.

Mr. **Power**. Senator, I'm going to let Mr. Elisburg respond to your initial question.

Mr. **Elisburg**. The principal difference that I think we have in this area of occupational disease compensation versus what goes on in the State systems and the centerpiece over this issue of causation, really, is that we believe that any kind of a one-on-one process where each person has to come in and bring in their experts and try to establish the same causation for one of these toxic exposures is doomed to failure. That the system simply cannot stand thousands and thousands of people coming in trying to do the same identical proof of causation.

And that's why we have suggested that the process here, which we believe is an acceptable scientific process, is one where you do the necessary medical studies and identify what the scientists call the increased burden of risk, the concepts of excess risk of diseases in certain populations to develop then the presumption that if you worked in a certain industry for a particular length of time and if you were exposed to a certain toxic substance over that particular length of time, and you come down with this disease that has been linked to that substance at the end of your 15 or 10 or 20 years or whatever, then you are entitled to be compensated for having that disease as a workplace exposure.

And it's really as simple as that. It's the—the science is really there. It's not new science. The concept of the excess risk that comes from Dr. Selikoff's testimony or others is fairly well known in epidemiological type studies. It's merely that we've locked ourselves into this notion that somehow you can't precisely pin down exactly what happened to that individual person unless you bring in a whole host of specialists and doctors.

But in terms of the legislative process and in terms of genuine scientific process, you can come up with pretty good estimates that as a result of this kind of exposure, this happened. As we understand it, the scientific level for determining that there has been an excess risk in a particular population may be 20 percent.

The legislation we are talking about says you have got to find a 30-percent excess risk. There may be other numbers that are involved. But it's really the idea that for large numbers of people who are going to be exposed to this stuff, you've got to get away from this notion that everybody has got to bring in their own doctor.

Senator **DURENBERGER**. All right.

Bill, do you have any further questions?

Senator **ARMSTRONG**. No.

Senator **DURENBERGER**. Gentlemen, thank you very much for your testimonies.

Mr. **POWER**. Thank you, Senator.

Senator **DURENBERGER**. The final panel consists of Dr. Hans Weill, professor of medicine, Tulane University on behalf of the American Lung Association and the American Thoracic Society; and Dennis Webb, president, Better Working Environments, Inc., of San Diego, CA.

STATEMENT OF DR. HANS WEILL, PROFESSOR OF MEDICINE, TULANE UNIVERSITY, ON BEHALF OF THE AMERICAN LUNG ASSOCIATION AND AMERICAN THORACIC SOCIETY

Dr. **WEILL**. Mr. Chairman, Mr. Armstrong, I'm pleased to be here on my own behalf and on the behalf of the American Lung Association. I'm also pleased that in the last several minutes the focus has, in fact, turned to the central issue, and, that is, the issue of disease caused by exposure to asbestos and how best to deal with those individuals who have those various conditions.

I'm not going to read my statement, and I appreciate the few quotes from it. I'm just going to highlight some of the medical issues that I think will be of interest to the committee.

First of all, I would like to stress that it's our view that a workable system is possible, and that the issues of diagnosis, causation and impairment, which are really the central issues, have been dealt with rationally, equitably, and efficiently around the world. As a matter of fact, systems are in place in the United Kingdom, in Canada, and most of the rest of the industrialized world that deal with these issues in the manner that I have suggested.

Effective approaches inevitably depend on experts; not in each court by any means. But experts to develop policy and guidelines and competent case-by-case determinations for claims, generally on a regional basis. Those are the components of an effective system.

The policy must be dynamic, in my view, and reflect the current state of scientific knowledge. Decisionmaking will depend on use of exposure information, medical information, and information on nonoccupational factors, such as smoking.

I agree with a number of the previous panelists that in science, when public policy is involved and social issues, we don't have to have every t crossed and every i dotted. We never get to that point. And, in fact, there is an enormous basis of decisionmaking in this particular area that is in place and can be used effectively.

Now I think it would be important to emphasize that the community which I represent does prefer, as a matter of fact—and we've said so publicly in a number of instances—a nondisease specific approach. It makes more sense. A comprehensive approach to the compensation of occupational disease would afford an opportunity to utilize not only pulmonary disease, but other, expertise more cost effectively. It's clear that asbestos related problems would obviously for some time take a substantial portion of the resources of such a system. But, nonetheless, there are other important conditions. For instance, for the lungs, chronic obstructive airways disease, asthma, other pneumoconioses, such as silicosis, which still exists, could also be dealt with by the same expert system, that would have to be in place.

The National Medical Panel, which is a good idea, and as a matter of fact, we have suggested for some time, nonetheless has to deal with a number of complex issues. Not the least of which are issues of causation.

Unfortunately, just a listing of attributable diseases is, in fact, an oversimplification, as I am sure the drafters, as well as the committee, know. As a matter of fact, a single cause for a nonspecific disease is increasingly recognized as being uncommon the more we know about multiple causation of occupational problems. Other things do play a part—life style, host characteristics, and so forth.

I would suggest that we have to begin to think about aportioning contribution where a complex of causal factors exist. And these complexities are often there. In situations of multiple potential causal factors, probabilities of risk can be assigned to each in many instances. The scientific data base is, in fact, there to do that in asbestos-related diseases, and it provides a very important example of how these multiple contributions play a part. Smoking and asbestos exposure both have an important role in excess lung cancer risks.

The question of how one might aportion the contribution of those two carcinogens has been one that has been given a good deal of thought. And, I think a practical solution to that issue can be found.

Even if, at the moment, and this is the case, we do not quite know enough about the carcinogenic and statistical models to do that with absolute scientific certainty, we have sufficient information, in my views to do a pretty good job in reasonably estimating the contribution of the multiple factors—in that case, smoke and asbestos exposure—to be both equitable and efficient.

Now, obviously, there are many things to be said about diagnostic criteria and standards that this panel would have to deal with in a policy arena. I'm not going to dwell on that. I might just indicate to you that there are international standards for the reading of x rays.

Mr. Motley suggested that one physician might read a film one way and another physician another way. That's absolutely correct. It happens all the time. And no nefarious motive need be invoked.

But, nonetheless, there are standards and ways for groups of readers to read films, which might very well be an adequate way to judge—to get a consensus opinion regarding film placing, which is a central bit of information in the question of asbestosis, since we usually don't have the access to lung pathology.

There might be a good way for a panel to be given the responsibility of obtaining a consensus or median reading to decide whether or not the changes of asbestosis are present. There are also pathologic criteria, when there is tissue available. And as a matter of fact, I served with a group of pathologists in a NIOSH/College of American Pathology group that developed, and published in a monograph, pathologic criteria for the asbestosis related diseases.

Impairment and disability are other areas of concern. There has been a substantial increase in our understanding of standardization and quality assurance for what is a unique opportunity to precisely measure the function of the lungs, which, of course, is related to impairment and, therefore, related to disability.

Using these techniques properly should be encouraged. There is, in fact, a movement in that direction and I think suitable standardization of the sort is available and should be used.

Finally, a national panel can't do it all. They can't, in my view, deal with the number of cases that under the current system would be in dispute and have referred to them—I think there has to be a competent system of regional case-by-case determinations, using the policy and the guidelines established by such an expert national group. Whether this be through legislation or through the private system really is of less concern to us than having it done properly and being sure that people who have disease are properly dealt with by a compensation system.

Causation and diagnosis is not really effectively handled by the current HHS regional system. It deals primarily with disability, the Social Security System, and one would have to substantially upgrade that kind of expertise, if, in fact, the proposal was going to be accomplished under the present apparatus.

I am optimistic that a system that is fair, reasonable, and efficient can be put into place, that the scientific data are available. We have got more information about asbestos-related diseases than just about any other occupational or environmental problem that I know of. If we can't put a system in place that is scientifically adequate, then we probably can't do it for anything else at this time.

So I think it is possible, but it does require attention to some of the details that I've tried to highlight.

Thank you, Mr. Chairman.

[The prepared written statement of Dr. Weill follows:]

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AMERICAN LUNG ASSOCIATION
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STATEMENT OF HANS WEILL, M.D.

ON BEHALF OF

THE AMERICAN LUNG ASSOCIATION
THE AMERICAN THORACIC SOCIETY

TO THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

RE: ASBESTOS COMPENSATION

SEPTEMBER 9, 1985

National Headquarters 1740 Broadway, New York, N.Y. 10019 • James A. Swomley, Managing Director

Mr. Chairman and members of the Subcommittee:

I am Hans Weill and am Professor of Medicine at the Tulane University Medical Center where I direct a large research program in occupational lung diseases. A brief resume is appended to this statement. I am pleased to present my views here on behalf of the American Lung Association and its medical section, the American Thoracic Society. The American Lung Association and the American Thoracic Society welcome this opportunity to provide input in the deliberations of this Subcommittee concerning one of the major occupational health issues faced by our society--asbestos related diseases. The ALA/ATS represents a professional society composed of chest physicians and biomedical scientists who investigate the causes of and work toward the prevention of lung diseases, as well as lay voluteers committed to reducing the burden of lung disease in communities around the country.

At the outset, we would like to emphasize our conviction that, as with many other occupationally induced disorders, the asbestos-related diseases are best dealt with by prevention through control of exposures to airborne concentrations of asbestos dust. Monetary awards can never compensate individuals for loss of health, or their relatives for loss of life, nor can any compensation scheme provide the adequate disincentive for industry which would lead to prevention of these conditions; this is due in large part to the long latency period between relevant exposure and clinical manifestations of these diseases. Recognizing, however, that past exposures have produced these conditions, we are committed to the provision of just resolution of claims by injured workers. The ALA/ATS has testified previously that it is our belief that disease-specific approaches to federal compensation legislation are not optimal in reaching the objective of equitable and timely awards for all workers who develop diseases as a consequence of their employment. The inadequacies of the black lung legislation have received considerable attention and have been the subject of periodic controversy, often focusing on questions of cost effectiveness and equity. Thus we regret the extension of a fragmentary approach to the overall burden of occupationally-induced lung disease implicit in the passage of further legislation dealing with the conditions caused by exposure to one specific material. Nevertheless, we recognize that there may well be overwhelming public and economic pressure making it necessary to consider seriously legislation dealing specifically with asbestos-related diseases. Therefore, in spite of our reservations, we are anxious to provide our views on how this problem might be approached.

Much has been written and said concerning the inadequacy of the present system in meeting the needs of individuals who have developed asbestos-related diseases. We are in full agreement with this assessment. In this context, tort litigation has shown to be inequitable, costly, and markedly unjust in the distribution of resources, a high proportion of awards going to individuals in whom evidence of disease cannot be demonstrated. Indeed one of the main deficiencies in this approach is that it distorts medical evidence, calling, for instance, for "proof" when in fact medical diagnosis is more often hypothesis, i.e., the best available explanation given the facts about the case. Other deficiencies are the failure to rely on objective medical evidence in individual cases, as in mass settlements; and the fact that in the assessment of individual cases medical experts may be chosen not for their expertise and objectivity, but because their testimony will support one side or the other. Given the nature of medical diagnosis, the facts about a case are frequently open to more than one interpretation. We re also mindful of the projections of the future burden of such litigation affecting all segments of our society. Similarly, we feel that the state compensation systems have often dealt poorly with asbestos and other workplace-associated diseases, and we have testified previously in regard to our view that a uniform federal system of occupational lung disease compensation should be developed. We have reveiwed the many draft bills that have been proposed and have considerable reservations about them, since it is our opinion that they have not dealt adequately with medical criteria for the conditions to be compensated.

Our comments on an appoach to the compensation of asbestos-related diseases is predicated on the belief that public policy in this area should be based on scientific information. We know asbestos-related diseases have all been shown to be dose-related, and we are persuaded by the evidence that there are differences in biological activity of asbestos related to fiber type and process. While this is not the appropriate forum for a comprehensive discussion of these or other related scientific issues, it seems reasonable, however, to suggest that the scientific data base can and should be used in the decision-making process, as the means of assessing the likelihood that the disease is due to exposure, particularly for conditions which also occur in the general population in the absence of asbestos exposure. While we readily recognize, however, that many of the decisions made in the clinical setting concering individual cases lack precision, informed medical opinions most often lead to reasonable conclusions. So it is with many clinical decisions.

Appended to these comments is a position paper developed by the ATS Ad Hoc Committee on Disability Legislation of the Scientific Assembly on Environmental and Occupational Health which details, in our view, the necessary elements of a more equitable and workable system of compensating the injured worker who has been exposed to asbestos. Please note that this proposed mechanism is applicable to any occupational lung disease. Also appended is an outline of what we consider to be a reasonable set of guidelines for case evaluation concerning the asbestos-related diseases based on present knowledge.

The remainder of our comments will address S. 1265, "The Abestos Workers' Recovery Act". Our comments will speak only to the medical/scientific issues within this proposal; it is inappropriate for the ALA/ATS to take a position on the financing mechanism or other administrative details contained in the bill.

Our specific concerns are with the establishment of a National Medical Panel as provided for in section 104:

- Causation: The primary responsibility of the panel appears to be that of making determinations of which diseases are caused by asbestos exposure and to publish a periodical listing. Issues of causation are far more complicated than that and include such questions as how to address multiple causation. This is particularly applicable to lung cancer when asbestos and smoking are almost always both factors to be taken into account. Any quidelines drawn up by such a panel should deal with this difficult problem.
- Diagnosis: The bill does not address questions related to diagnosis of disease. The panel could also be responsible for providing guidance on diagnostic criteria for asbestos-related diseases. Such questions as lower level of profusion (ILO classification) necessary for a diagnosis of asbestosis could be con-

sidered, but not necessarily determined by the panel. The use of mesothelioma panels for the pathologic diagnosis of this tumor is another issue on which quidance could be provided by the panel.

- Impairment: The bill does not delineate whether the Social Security guidelines or state compensation rules will be used for disability/impairment determinations. This subject needs careful review by a medical panel and should be included in the guidance document prepared by the group of selected experts.

All of the diseases which have resulted from asbestos exposure in the workplace have serious consequences to health, and may impair function and reduce longevity with their implicit personal tradegy. For the individuals at risk because of past exposure to asbestos dust, public responsiblity is to insure that those who are injured receive the necessary support and assistance. This has not always been the case. The blame for this must be shared by elements of the legal and medical system, as well as segments of management and labor. In our testimony, we have pointed to mechanisms which, in our opinion, will maximize rationality and equity. We have every expectation that the Congress will respond appropriately to this difficult challenge.

Thank you.

Disability Legislation for Occupational Lung Disease

The purpose of this statement is to encourage the enactment of legislation that provides a *uniform* and practical system for disability determination in individuals with occupational lung disease.

In a recent report to Congress, the Secretary of Labor has indicated the inadequacies of current disability programs for individuals with occupational diseases (1). For example, one out of every four of those severely disabled receive no income support payments while one in every three who receive payments have multiple benefits! Eighty-six per cent of this income support is from federal programs (Social Security, Veterans Administration, Welfare) while only 5% comes from state workers' compensation programs.

The Federal Coal Mine Health and Safety Act of 1969 (and two subsequent amendments) authorized the establishment of a federal program to provide benefits to coal miners (or their survivors) totally disabled by coal workers' pneumoconiosis (CWP, sometimes referred to as "black lung"). It was the first U.S. law providing workers' compensation benefits for a single occupational disease. However, in the past few years, and apparently without regard for the adverse experience with the "black lung" act, numerous separate bills have been introduced into the Congress dealing with other single occupational diseases such as asbestosis ("white lung"), and byssinosis ("brown lung"). On July 28, 1980, the U.S. General Accounting Office reported a study of 200 claims randomly selected from the 14,789 that had been filed with the Social Security Administration before July 1, 1973 and approved as of May, 1979; they found "that in 88.5% of the cases, medical evidence was not adequate to establish disability or death from CWP" (2). A further GAO study of cases handled by the Department of Labor since 1973 is now under way. Coal miners themselves are often perplexed when they are denied benefits, especially when one of their colleagues without any obvious difference in respiratory symptoms is receiving them.

From an economic standpoint, the cost of the "black lung" benefits program has been staggering. In the first eight years after its enactment, 1969 through 1977, almost $6 billion in benefits were paid to 365,512 claimants; according to the Secretary of Labor, the more liberal eligibility criteria introduced by the 1977 Act will result in an estimated $1.6 billion to be paid in benefits for the fiscal year of 1979! Even more important to consider is the fact that legal, medical, and administrative costs have amounted to about as much as the benefits. This translates into a total cost of approximately $15 billion for the entire program through 1979.

This statement describes a proposed system for the assessment of disability resulting from occupational lung diseases which can serve as a basis for the design of federal and/or state legislation. It is based upon a review of plans already in existence in several other countries. Further, the principles involved are applicable to the determination of disability in nonoccupational respiratory diseases as well. These principles are:

1. All workers disabled by occupational lung disease should receive equal treatment under the law.
2. Respiratory *impairment* should be determined by highly qualified physicians.
3. Respiratory *disability* should be determined by highly qualified professionals from the fields of law, education, and economics, as well as the health sciences.
4. Decisions regarding causation of the respiratory impairment shall take into account both occupational and nonoccupational hazards (such as smoking).
5. Decisions regarding causation shall utilize all available scientific data, including the results of appropriate epidemiologic studies.

System for Determination of Disability

The system for disability determination should consist of panels, boards, and a commission.

I. Panels throughout the country for determination of respiratory impairment

The panels should consist of at least one physician and two or more additional members to be chosen by the examining physician as deemed necessary.

A. *Examining Physician*

The examining physician shall not be the claimant's personal physician and shall have the following qualifications:

1. Pulmonary disease specialist – certified by or eligible for certification by the American Board of Pulmonary Diseases, with at least five years of clinical practice in the subspecialty of pulmonary diseases (at least 50% of practice devoted exclusively to pulmonary diseases), or
2. Special competence in occupational lung diseases as demonstrated by:
   - a. Board certification or eligibility – American Board of Preventive Medicine or attendance at special programs or courses in occupational lung disease for a minimum of 25-30 hours per year.
   - b. Qualification as a "B" X-ray reader by NIOSH or recognized expertise in X-ray interpretation in the field of occupational lung disease.

B. *Additional Panel Members*

Depending upon the individual problem presented by a claimant, the examining physician may require consultation from professionals in such fields as respiratory physiology, cardiology, pathology, pharmacology, and toxicology.

C. *Functions of Panel*

In examining a claimant, the physician will conduct a complete history and physical examination. This must include details of employment dates, exact type of work, dust counts if available, and other hazardous exposure data. All pertinent radiologic and laboratory studies and all pertinent prior medical records will be obtained. The complete report of the findings shall specify what organs are impaired, approximately to what degree, and whether the impairment is temporary or permanent. Contributions of nonoccupational disease, if any, shall be identified. The report shall be forwarded to the Board for Disability Determination, with a copy to the claimant. Where appropriate and pertinent, the claimant should be scheduled for follow-up visits to determine any changes which may occur. Timing of such follow-up examinations should be at the discretion of the examining physician.

D. *Selection of Panels*

Panels shall be selected by appropriate governmental agencies.

E. *Location of Panels*

Panels should be located throughout the country with a view to minimizing travel and other administrative costs and maximizing convenience to claimants requiring examination.

II. Boards for Disability Determination

A. *Membership* shall include the following:

- more -

1. A pulmonary physician.
2. A recognized expert with competence in the field of ergonomics as it relates to the energy requirements of various kinds of work, i.e., the determination of the respiratory capacity of an individual to carry out comfortably the activities required by specific jobs.
3. A lawyer experienced and knowledgeable in the field of workmen's compensation.
4. A social worker knowledgeable in such matters as vocational rehabilitation, the cost of living by geographic area, existing pension programs for workers, legislation affecting income, and the like.
5. An employer representative engaged in work involving a respiratory occupational hazard.
6. An employee representative engaged in work involving a respiratory occupational hazard.

B. *Functions of Board*

The Disability Board shall determine to what degree, if any, the claimant is disabled for his/her usual employment, whether the disability is permanent, and an estimate of the relative contribution of occupational and nonoccupational causes to any disability found. The Board shall also determine whether or not the claimant's employer is able to place the claimant in a different, non-hazardous position, either with or without vocational rehabilitation.

C. *Selection of Board Members*

The members of the Board shall be selected by the appropriate governmental agency.

D. *Location of Boards*

These should be established in the current federal regions.

III. Commission for Appeal

A claimant shall have the right to appeal decisions regarding impairment, disability, or causality to this Commission. The Commission shall consist of a lawyer, an employer, an employee, and a pulmonary physician with expertise in occupational lung disease. The basis for appeals shall be presentation of acceptable medical evidence by the claimant tending to refute the findings of the Panel or Board.

References

1. An Interim Report to Congress on Occupational Diseases. Submitted to Congress, June 1980. U.S. Dept. of Labor, Assistant Secretary for Policy, Evaluation and Research, 1980.
2. Report to the Congress of the United States by the Comptroller General. Legislation allows black lung benefits to be awarded without adequate evidence of disability. United States General Accounting Office, HRD 80-81, July 28, 1980.

This paper was prepared by an Ad Hoc Committee on Disability Legislation of the ATS Scientific Assembly on Environmental and Occupational Health. The Committee members are as follows:

A. D. RENZETTI, JR., M.D., *Chairman*
STUART M. BROOKS, M.D.
EDWARD A. GAENSLER, M.D.
IAN T. HIGGINS, M.D.
ROGER S. MITCHELL, M.D.
RAYMOND L. MURPHY, M.D.
MARC SCHENKER, M.D.
HANS WEILL, M.D.

PROPOSED GUIDELINES FOR CASE EVALUATION
BASED ON ASSESSMENT OF EVIDENCE AVAILABLE MARCH, 1983

The case evaluation process involves establishing the presence of disease (diagnosis), its cause, and the extent of its functional effect on the individual (impairment).

I. Diagnosis and Determination of Cause

A. Asbestosis

Asbestosis is a pneumoconiosis defined as diffuse fibrosis of the lungs caused by asbestos exposure. Its features include rales (crackles), breathlessness, finger clubbing, lung function abnormalities (usually reduced volumes and impaired gas exchange), radiographic changes (irregular and linear opacities), and histopathologic demonstration of fibrosis with tissue fiber identification. The first four of these are non-specific; changes on the x-ray and pathologic tissue examination have increasing, but by no means absolute, specificity. Individually, these are not sufficient to make a diagnosis; in combination, the diagnosis depends upon weighing probabilities and assessing the evidence _in toto_, an important component of which is estimation of past exposure. In practice, the diagnosis is usually established on radiographic and exposure evidence. An expert committee of the College of American Pathologists and the National Institute for Occupational Safety and Health has recently developed guidelines for the pathologic diagnosis of asbestos-associated disease. When lung tissue is available for histopathologic examination, a diagnosis of asbestosis depends minimally upon the demonstration of discreet foci of fibrosis in the walls of respiratory bronchioles associated with accumulations of asbestos bodies (light microscopy). Additional findings are diffuse interstitial pneumonia and fibrosis. Neither fibrosis or asbestos bodies alone is sufficient for the histopathologic diagnosis of asbestosis.

B. Non-malignant Pleural Effects

These include pleural effusions, focal hyaline thickening (plaques), and diffuse pleural fibrosis. Plaques indicate exposure, not disease, because they do not cause symptoms or functional impairment. Attributability is assessed on the basis of an exposure history and the absence of other causal factors.

C. Lung Cancer

The diagnosis of lung cancer in asbestos-exposed individuals is no different than in other clinical settings. In population studies of various occupational groups, evidence of asbestosis has been found when excess lung cancer risk is demonstrated for comparable levels of exposure. In the individual case of lung cancer, the cause cannot be determined precisely. For this reason, the judgement must take into account length, intensity and character of exposure, evidence of other asbestos-associated diseases, and smoking history.

D. Malignant Mesothelioma

The primary issue is valid diagnosis. This diagnosis can generally not be established clinically, or radiographically, or with pleural fluid examination, or with limited biopsy tissue. Since the potential for misdiagnosis is considerable, adequate tissue specimens should be examined by pathologists experienced and expert in the diagnosis of this tumor (e.g., mesothelioma panels). When the diagnosis has been established, a history of exposure, even if short, is sufficient for a judgement of causation.

II. Assessment of Impairment

This follows the establishment of an asbestos-associated disease. In cases of extensive asbestosis or extensive pleural fibrosis, reference should be made to criteria for impairment in restrictive disorders outlined in the ATS statement on evaluation of impairment/disability secondary to respiratory disease (attached). Use will be made of pulmonary function tests and exercise performance testing when necessary. Regional panels will be responsible for periodic updating of impairment level.

RESUME

Hans Weill

Hans Weill received his B.A. and M.D. from Tulane University. His training includes an internship at Mount Sinai Hospital in New York, and a residency in internal medicine at Charity Hospital and Fellowship in Pulmonary Diseases at Tulane, both in New Orleans.

Since 1962, Dr. Weill has been on the Tulane faculty. His current position is Professor of Medicine, Chief of the Pulmonary Diseases Division and the Schlieder Foundation Professor of Pulmonary Medicine at the Tulane University School of Medicine in New Orleans. He directs an interdisciplinary research program in occupational lung diseases, and for the past twenty years has been investigating the respiratory health effects of workplace exposure to such airborne inhalants as silica, asbestos, man-made mineral fibers, cotton, chlorine and isocyanates. His research team has produced information on the relationships between qualitative and quantitative aspects of exposure dose and indicators of respiratory disease. The results of these investigations have been published in many scientific journals and books and been used by federal regulatory agencies in setting occupational health standards, and have formed the basis for testimony in Congressional and judicial hearings.

Dr. Weill has consulted widely with federal agencies and with institutions in the private sector on occupational and environmental pulmonary problems. He has served as president of the American Thoracic Society (medical and scientific arm of the American Lung Association), and is on the certifying Subspecialty Board for Pulmonary Diseases and on the Board of Governors of the American Board of Internal Medicine. He recently completed a term as Chairman of the Pulmonary Disease Advisory Committee of the National Institutes of Health, and has several editorial responsibilities.

He was recently a Science and Public Policy Fellow at The Brookings Institution, where his project dealt with an analysis of the use of the scientific data base in asbestos-associated diseases in connection with formulation of public policy.

Senator **Durenberger**. Dr. Weill, where does the current most substantial risk of exposure to asbestos-related disease exist in this country?

Dr. **Weill**. As we have heard this morning, the number of products being manufactured is substantially reduced. I think the major risk at this time is among those workers who are faced with the responsibility of demolition, tear out, renovation of existing material that has been there for many years. Now usually those workers are well protected, or they should be, while they are doing those jobs. But that's where most of the asbestos is. When it gets torn out because of new construction or renovation it may become airborne.

Manufacturing is now a minimal risk. Mining, of course, has never been very much of a risk in this country. There are one or two mines; I'm not sure how many. So it's mainly in those individuals who are in the construction industry who are, in fact, having to deal with asbestos that has been in place for a number of years.

Senator **Durenberger**. The notion of contribution suggests, particularly, I guess, with regard to respiratory diseases, issues like exposure and the degree of exposure. You have indicated life style. There has got to be some genetic factors involved. There ought to be some previous health condition factors involved. Is it really possible currently to do a contributions system when we are even getting some conflicting evidence about smoking and some of the things we have been taking for granted?

Dr. **Weill**. Mr. Chairman, I could convene tomorrow a group of international experts who have all the credentials and the credibility that I think you and other policymakers would want who could agree on almost all of the issues that are contested in the courtroom. You read part of the statement which I prepared on behalf of the American Lung Association suggesting that doctors disagree. They do in the courtroom. The point is that the science is very substantial.

Now I've raised the issue of whether the data and conclusions always meet ultimate scientific tests? Very often, they do not. As a matter of fact, if you looked at the statistical model regarding asbestos and smoking in cases of lung cancer, the models tell us that most of the cases are due to both factors and they cannot truly be separated. So what one would have to do—this is an illustration—is to look at the risk which is produced by each of the factors, if they were acting independently, and then look to see how an individual claimant fits into the models in terms of those exposure response relationships.

It gets complex. I hope that's understandable. It's not easy, but I think it can be done.

Senator **Durenberger**. You are saying to us that we ought to—that in the case of asbestos-related diseases, we are talking largely about diseases that are already out there in one way or another. We could set up a process now which over a period of time—we put it in place on a national level. And leaving aside the willful characterizations of some of the actors involved and so forth. That that might then become precedent for other kinds of toxic, carcinogenic related occupational diseases.

Dr. **Weill**. That's a very nice scenario, Senator. And I would hope that this, in fact, could become a model. I've directed a large group that is devoted entirely to research in occupational lung diseases funded primarily by the NIH. We have been involved in asbestos research for 15 years. I am familiar with the data base which is available. I think it can be used in this system. X rays can be properly read, and there can be reasonably good agreement. Nothing is perfect. We may be close to a practical solution, but we are not moving in that direction for various reasons. We are making decisions on a one-by-one basis, and very, very slowly at that.

Senator **Durenberger**. Senator Armstrong.

Senator **Armstrong**. Mr. Chairman, I don't want to put words in the doctor's mouth, but I think I heard him say that he could convene this panel of experts and they would all agree on the main issues, even though the courtroom process sort of conveys the impression that there is a lot of disagreement. Maybe a lot more disagreement than actually exists within the profession. Disagreement over the fine points, creating the impression maybe there is a broad, general disagreement that really isn't there.

Dr. **Weill**. Yes, Senator. I think there is that disparity. Now I don't think I would have said it, and I hope I didn't, quite as definitively as you did. I'm not saying that a group of experts would agree on all the issues. I think that there would be a consensus in an overwhelming majority of credible scientists who have not only reviewed and know the literature, but also who have had experience in the investigation of these problems themselves. There would be a remarkable consensus, much more than you find in the courtroom.

Senator **Armstrong**. Would that lead you to believe that maybe some kind of a procedure to settle these cases promptly without going through the agony of litigating them or filing individual cases and resorting to the drawn out legal processes is in order? Before you answer that, let me say that I recognize you are here in your capacity as an expert medical witness, but if you have an opinion on that after having looked at it, I think we'd be interested to know what it is.

Dr. **Weill**. I think the implication of my testimony so far is that I think a system could be put into place, whether it be a Federal system or private system. As I say, that is beyond our particular scope of concern. But I believe that it can be done, if it's done with proper attention to the issues that I've raised, and many others that time doesn't permit me to.

Senator **Armstrong**. Doctor, I thank you not only for your response, but your very thoughtful testimony, which we all appreciate.

Mr. Chairman, our colleague, Chuck Grassley, could not be here this morning, but as you may be aware, he is very much interested in this problem for a lot of personal as well as professional reasons. He is, in addition to being a member of this committee, the chairman of the Administrative Practice and Procedure Subcommittee of Judiciary. And in that capacity, he has participated in hearings on this subject. He has a great concern about it both from the standpoint of the human concern about these victims who are not being compensated in a timely manner, the fear that they may not be compensated down the line, if there isn't money to pay them; and also from the fact that the judicial system is just being clogged up beyond its ability to respond by this flood of cases.

Senator GRASSLEY. He has sent a letter which I would just like to give to staff f~~or inc~~lusion in the record expressing some of these concerns and to just let you know that if, as and when we can figure out where we are going on this that he will want to be in on it and I think will make a valuable contribution.

Senator DURENBERGER. All right. The letter will be made part of the record.

[The letter from Senator Grassley follows:]

135 Hart Senate Office Building
Washington, DC 20510
(202) 224-3744

721 Federal Building
210 Walnut Street
Des Moines, IA 50309
(515) 284-4890

206 Federal Building
101 1st Street S.E.
Cedar Rapids, IA 52401
(219) 399-2555

United States Senate
CHARLES E. GRASSLEY

103 Federal Courthouse Building
320 6th Street
Sioux City, IA 51101
(712) 233-3331

210 Waterloo Building
531 Commercial Street
Waterloo, IA 50701
(319) 232-6857

116 Federal Building
131 E. 4th Street
Davenport, IA 52801
(319) 322-4331

September 4, 1985

The Honorable William Armstrong
528 Hart Senate Office Building

Dear Bill:

I applaud your efforts to find a legislative solution to the problem of compensating workers injured by occupational exposure to asbestos. I support your sponsorship of S. 1265, The Asbestos Workers Recovery Act, and hope that the scheduled hearings in the Senate Finance Committee will fully explore the nature and extent of the asbestos problem, as well as possible solutions to this crisis.

Millions of Americans have been exposed to the hazards of asbestos in the past forty years and many have developed asbestos-related illnesses as a result of this exposure. These injured workers are seeking an equitable and orderly system of compensation. Currently, they must turn to our judicial system for redress; a forum which is costly, time-consuming and generally ineffective for most litigants. Not only do court awards for the same type of injury vary dramatically, but the awards are diminished by expensive legal fees and litigation expenses. It is estimated that only thirty-seven cents out of every dollar spent as a result of litigation is actually received by the claimant. This is an obvious waste of the resources available to compensate injured asbestos workers.

The flood of asbestos litigation has created an immense problem for the judicial system. At present there are approximately 25,000 asbestos cases pending in federal court and 8,000 cases pending in state courts. New cases continue to be filed at a nationwide rate of more than 500 per month. Asbestos lawsuits have already become the largest area of product liability litigation in history, far surpassing other categories both quantitatively and qualitatively. The anticipated volume of

Committee Assignments:
BUDGET FINANCE JUDICIARY LABOR AND HUMAN RESOURCES SPECIAL COMMITTEE ON AGING

claims is overwhelming and poses a problem with unknown consequences to the state and federal court system. I reiterate the statement made by the Fifth Circuit Court in Jackson v. Johns-Manville Sales Corporation that "legislation would be the preferred solution to the dilemna of providing an adequate scheme for the proper distribution of compensation." The judiciary's inability to cope with a problem of this magnitude alone argues for corrective action.

As a member of the Senate Judiciary Committee and Chairman of the Administrative Practice and Procedure Subcommittee, I have participated in hearings focusing on issues of a similar nature to the asbestos problem. I served on the Judiciary Committee when hearings focusing on the nature and extent of the problemns associated with radiation exposure were held approximately two years ago. More recently, I chaired the June, 1985 subcommittee hearings on the Contractors Liability and Indemnification Act which provides a system of indemnification of government contractors in excess of reasonably available financial protection. My involvement in hearings on both radiation exposure and defense contractors' liability has convinced me of the utility of hearings which explore the full scope of the issues involved in an effort to find the appropriate legislative solution.

The current method of litigating claims for compensation by injured asbestos workers must be reevaluated. I believe Congress should act now to devise a legislative plan which will provide an alternative to the present ineffective court system. After Senate Finance Committee hearings are completed, I would like to join you in cosponsoring a legislative solution which would establish a comprehensive system of compensation for these workers. Again, I congratulate you for your leadership in sponsoring S. 1265 and stand ready to support your efforts.

Sincerely,

Chuck Grassley

CHARLES E. GRASSLEY
United States Senator

CEG/slt

Senator **Durenberger**. Doctor, thank you very much. We appreciate your testimony.

Our final witness is Mr. Dennis Webb. Mr. Webb, your statement will be made part of the record, and if you would please summarize.

STATEMENT OF C. MICHAEL DEESE, WEBSTER, CHAMBERLAIN & BEAN

Mr. **Deese**. Mr. Chairman, I am Michael Deese. I just wanted to indicate that we appreciate very much the opportunity to be here today, especially in view of the fact that Mr. Webb's testimony, the emphasis of his testimony, is somewhat different than that of the previous witnesses. Mr. Webb will, indeed, follow up on one of your questions to Dr. Weill; namely, the issue of where asbestos exposure is occurring today.

STATEMENT OF DENNIS WEBB, PRESIDENT, BETTER WORKING ENVIRONMENTS, INC., SAN DIEGO, CA

Mr. **Webb**. Good morning, Mr. Chairman and Senator Armstrong.

My name is Dennis Webb. I'm the president of Better Working Environments, a manufacturer of chemical products used in encapsulation and removal of asbestos. My company, which is known throughout the industry as BWE, is based in Las Vegas, NV, with offices in both Las Vegas and San Diego, CA.

Our company's products have been in the development stage for 4 years. During that time, we have engaged in a substantial amount of research and testing designed to find solutions to the asbestos problem. As a result of that research and testing, we have gained a great deal of knowledge concerning worker exposure to airborne asbestos fibers, the concern addressed in S. 1265.

I appreciate the opportunity to be here today, and I will offer several comments on that bill.

First, I believe the traditional tort laws may not provide a fair and equitable remedy to the asbestos-related disease victim. A concept of a Federal claims procedure funded by an asbestos defendant and the Federal Government can be a good one as long as it is economically feasible. The economic feasibility of a trust fund envisioned in the Asbestos Workers' Recovery Act depends on there being an end or at least a drastic reduction in the incidence of asbestos-related disease claims in the foreseeable future.

While the Clean Air Act and the EPA and OSHA regulations have resulted in a decrease in the amount of asbestos being put into our environment, the current Federal regulations governing the removal of asbestos are insufficient. As a result, an entirely new group of asbestos disease claimants is being created. Thousands of asbestos workers, as well as millions of children and other workers who return to supposedly clean air office buildings, plants and schools, are exposed to dangerously high levels of airborne asbestos fibers every day.

The reason for this is that the procedures used today in asbestos encapsulation and removal are not working. They can actually increase rather than decrease the level of airborne asbestos fibers.

Here's a good example of what I'm talking about: Both EPA and OSHA have established limits for the amount of asbestos which may be found in the air during and after asbestos removal projects. The EPA recommends a technology that many people consider outdated for the removal of asbestos. In essence, EPA recommends that water containing soap be sprayed on asbestos in sufficient quantities to permit the asbestos to be removed while wet. Recently, however, the EPA itself has estimated that if their recommended technology is used, the EPA's own asbestos exposure limits will be exceeded. In other words, if a contractor follows EPA's recommended guidelines, that contractor will most likely violate EPA and OSHA standards. And that is precisely what is happening in this industry today.

The asbestos abatement worker and all those who follow him back into the supposedly clean workplace are the asbestos-related disease claimants of tomorrow.

My concern is that if the Federal Government is considering obligating itself to a fund, an asbestos claim program, it ought to take every step possible to reduce asbestos exposure, and, therefore, the number of claims that will be made against that program in the future.

This can be accomplished only if state of the art procedures and products are used rather than outdated technology.

The EPA calls asbestos a "silent killer," yet this industry is using soap and water on this ultrahazardous material. Using soap and water does not work. It gives the removal contractor a short-term financial gain, but it gives the Federal Government and all future asbestos defendants a long-term liability.

I thank you for the opportunity to speak here today, and I would be happy to answer any questions.

[The prepared written statement of Mr. Webb follows:]

STATEMENT IN SUPPORT OF

S.1265

ASBESTOS WORKERS' RECOVERY ACT

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON FINANCE

SUBCOMMITTEE ON HEALTH

Submitted by

Mr. Dennis Webb
President
Better Working Environments, Inc.
3716 Scripps Way
Las Vegas, Nevada 89103
(702) 871-1301

September 4, 1985

SUMMARY OF STATEMENT OF

MR. DENNIS WEBB

Better Working Environments, Inc. (BWE), a manufacturer of chemical products used in the encapsulation and removal of asbestos containing materials, supports the concept of a federal claims procedure for those injured by asbestos-related diseases contracted as a result of workplace exposure to asbestos. BWE offers the following comments on S.1265:

1. Consideration should be given to making the bill applicable to employees exposed to asbestos during asbestos abatement activities. As presently drafted, the bill's application to those workers is unclear.

2. The Subcommittee should be aware of the fact that a proposed national standard for asbestos abatement would, if adopted and utilized throughout the industry, require abatement workers to release their employers from all liability for asbestos exposure.

3. While the Congress, EPA and OSHA have acted to reduce exposure to asbestos in the asbestos and asbestos product industries, not enough has been done to reduce exposure in the asbestos abatement industry. One federal agency, the EPA, recommends the use of a removal procedure which, according to EPA's own estimates, will result in worker exposure to levels of asbestos exceeding the permissible limits prescribed by EPA and OSHA. Consideration should be given to requiring the use of the best available technology in asbestos abatement activities. In so doing, the risk of continued worker exposure will be reduced, as would the long-term liability of the Trust Fund contemplated by S.1265.

Introduction

Better Working Environments, Inc. (BWE) is a Nevada corporation with its principal manufacturing facility located in Las Vegas, Nevada. BWE is engaged in the manufacture and sale of chemical products used in the encapsulation and removal of asbestos containing materials. The asbestos abatement industry, itself an infant industry, has experienced dramatic growth due to the recent increase in attention paid to the dangers of asbestos.

Asbestos is currently being encapsulated in, or removed from, thousands of buildings across the United States. BWE supplies chemical products to the asbestos abatement contractors which actually encapsulate or remove asbestos from those buildings.

Concept of the Asbestos Trust Fund

BWE agrees with the proposition that traditional tort law remedies may be inadequate for workers who, due to workplace exposure to asbestos, are suffering from asbestos-related diseases. The number of private lawsuits seeking damages for asbestosis and other asbestos-related diseases is substantial and growing daily. During the time required to litigate these cases, the injured person, already a victim of the disease, is not compensated at all. All too often the primary beneficiaries even in successful cases are not those who have suffered injury.

Many persons whose diseases are surfacing only today were exposed to asbestos several decades ago. To the extent that the Clean Air Act and EPA regulations promulgated in the early 1970s resulted in the ban of spray-applied asbestos in new buildings and greater regulation of asbestos products, the number of persons likely to contract an asbestos-related disease twenty, thirty or forty years from now appears to have been reduced. If that reduction can be counted on as a certainty, that is, if the incidence of asbestos-related diseases is, or soon will be, in decline, the federal government's participation in the Trust Fund which would be established pursuant to S.1265 is both warranted and economically feasible. It would be warranted because, as is pointed out in Section 2(4) of the bill, the federal government shares the responsibility for historical worker exposure to asbestos. It would be economically feasible because, presumably at some point in the future, the number of persons filing asbestos-related disease claims would be drastically decreased.

BWE would submit, however, that the probability of such a decrease in asbestos-related disease is not a certainty. While it is true that workers are no longer being exposed to asbestos as it is added to the work environment (because asbestos is no longer being added), workers are being exposed when asbestos is encapsulated or removed from a work environment. Studies conducted by the EPA and OSHA confirm that airborne asbestos fiber levels often increase during, and sometimes after, asbestos abatement procedures. As a result, both the workers in the abatement area, and in adjacent work areas, are being exposed to the very asbestos fibers which cause asbestosis, mesothelioma and other asbestos-related diseases.

It may come as a surprise to the Subcommittee to know that the EPA (1) has established a permissible exposure level (PEL) for asbestos abatement workers, (2) recommends that a particular asbestos removal procedure (spraying of water mixed with a surfactant) be used, but (3) has estimated that use of that recommended procedure will result in workers being exposed to higher levels of asbestos than the PEL. If this situation is allowed to continue, one of the premises upon which S.1265 based, namely, that the incidence of asbestos-related disease will decrease in the future, may prove to be unrealistic. BWE suggests that, if federal money is to be used to pay asbestos claims, the federal government should take all possible steps to ensure that current exposure to asbestos, and therefore the number of future claims against the Trust Fund, are reduced. This could be accomplished by requiring the use of the best available abatement technology, such as a true penetrating asbestos encapsulant, or a removal encapsulant, in all asbestos abatement activities. Absent such a requirement, asbestos abatement may well increase, rather than decrease, the incidence of asbestos-related disease, resulting in a tremendous financial burden upon the Trust Fund.

Scope of S.1265

In view of the fact that much current worker exposure to asbestos occurs during asbestos abatement, it would seem that consideration should be given to including abatement contractors within the scope of the bill. As the bill is presently drafted, it is unclear that these contractors would be so included. Although abatement contractor employees would seem to fit the definition of "affected persons" found in Section 3(1), asbestos abatement contractors do not appear to qualify as either "asbestos defendants" under Section 3(4) or "suppliers" under Section 3(18). Consideration should be given to providing abatement contractors the option to participate in the program.

Current Worker Rights

As noted in Section 2 of the bill, many victims of asbestos-related disease resort to common law tort litigation to attempt to obtain compensation for their injuries. S.1265 would replace that right with an exclusive claims system. A draft "asbestos master specification", currently being prepared for submission to the American Institute of Architects, contains a worker's release which abatement workers would be required to sign prior to employment. By signing the release, workers would waive their rights to claim damages for asbestos-related injury, except their right to workmen's compensation. This waiver, if incorporated in contracts by architects nationwide, would seem inconsistent with the goals of S.1265.

Conclusion

BWE supports the concept of an asbestos claim Trust Fund, but suggests that greater emphasis needs to be placed upon ensuring that future worker exposure to asbestos is actually reduced. Absent such an emphasis, the Trust Fund's liability could extend forever.

Senator **Durenberger**. One, on the issue of the EPA standards and the problems for the abatement workers. I apologize for not remembering whether or not you were given an opportunity to testify at the hearings that I held on Toxic Substances Subcommittee on Environment and Public Works. That is an issue that specifically I am interested in. That is, the pressure on school buildings and other Federal buildings. We are opening up a whole new generation of workers to exposure. And I assume the record is still open in that hearing. So if you wanted to take either this testimony or a modified testimony that follows up on your concerns about the EPA and submit it to the Toxic Substances and Environmental Oversight Subcommittee of the Environment and Public Works Committee, I would appreciate it in making it that part of that record.

Senator Armstrong.

Senator **Armstrong**. Mr. Chairman, I have no questions. I thank Mr. Webb for his testimony.

And as the hearing closes, to again thank you for doing this. I must say that we've really got a complicated problem here.

Senator **Durenberger**. Thank you very much.

Mr. **Webb**. Thank you, Senator.

Senator **Durenberger**. The hearing is adjourned.

[Whereupon, at 12:05 p.m., the hearing was concluded.]

[By direction of the chairman the following communications were made a part of the hearing record:]

ASBESTOS VICTIMS OF AMERICA

WRITTEN STATEMENT FOR THE RECORD BY

JAMES E. VERMEULEN, FOUNDER AND EXECUTIVE DIRECTOR

SUBMITTED TO:

SENATE COMMITTEE OF FINANCE'S SUBCOMMITTEE ON HEALTH

REGARDING SENATE BILL 1265

THE "ASBESTOS RECOVERY ACT"

JAMES E. VERMEULEN

FOUNDER AND EXECUTIVE DIRECTOR

ASBESTOS VICTIMS OF AMERICA

P.O. BOX 559

CAPITOLA, CALIFORNIA 95010

(408) 476-3646

ASBESTOS VICTIMS OF AMERICA

STATEMENT FOR THE RECORD

I APPRECIATE THE OPPORTUNITY TO SUBMIT MY WRITTEN STATEMENT FOR THE RECORD, AS THE FOUNDER AND EXECUTIVE DIRECTOR OF ASBESTOS VICTIMS OF AMERICA, REPRESENTING THOUSANDS OF MY FELLOW ABANDONED WOUNDED WORKERS.

ASBESTOS VICTIMS OF AMERICA WAS CONCEIVED BY ME, AND BORN IN THE SPARE BEDROOM "OFFICE" OF MY HOME A FEW YEARS AGO WHEN IT BECAME OBVIOUS THAT MY PLIGHT AS AN ASBESTOS VICTIM WAS BEING TOTALLY IGNORED. NOT ONLY BY OUR WORKERS COMPENSATION IN THE STATE, BUT ALSO BY THE FEDERAL GOVERNMENT AND BY THE INDUSTRIES WHO CAUSED MY INJURY.

WE NOW HAVE MEMBERS THROUGHTOUT THE UNITED STATES. THE PLIGHT OF THE ASBESTOS VICTIM IS BEYOND ANYTHING I HAD ANTICIPATED WHEN I BEGAN AVA, AND THE ASTONISHING GROWTH RATE OF ASBESTOS VICTIMS OF AMERICA CLEARLY DENOTES THAT VICTIMS ARE DEMANDING TO BE HEARD.

THESE HEARINGS ARE NOT THE FIRST LEGISLATIVE HEARINGS AT WHICH AVA HAS PROVIDED INPUT. THE PREVENTION OF ASBESTOS DISEASE IS AS IMPORTANT AS COMPENSATION OF ITS THOUSANDS AND THOUSANDS OF VICTIMS. TO THIS END, IN 1982 THE CITY AND COUNTY OF SANTA CRUZ, CALIFORNIA, WHERE AVA IS HEADQUARTERED, PASSED INTO LAW A PUBLIC HEALTH ORDINANCE PROHIBITING THE PURCHASE BY MUNICIPAL AND COUNTY AUTHORITIES, OF ANY PRODUCTS CONTAINING ASBESTOS. TO OUR KNOWLEDGE THIS IS THE FIRST SUCH LAW PASSED BY ANY CITY AND COUNTY IN THE ENTIRE UNITED STATES.

IF THE MEASURES SOUGHT BY OUR UNION BROTHERS AND SISTERS IN ORGANIZED LABOR'S HEALTH AND SAFETY DEPARTMENTS HAD BEEN IN EFFECT WHEN I WORKED WITH ASBESTOS, I WOULD NOT BE SUBMITTING THIS STATEMENT. THERE WOULD ALSO BE NO REASON FOR AN ORGANIZATION SUCH AS ASBESTOS VICTIMS OF AMERICA, WHICH REPRESENTS

THE INTERESTS OF THOUSANDS OF VICTIMS AND THEIR SURVIVORS, WHOSE LIVES HAVE BEEN TOTALLY DEVASTATED BY ASBESTOS.

I'M CERTAIN THERE ARE THOSE WHO ARE WONDERING, HOW CAN AN ASBESTOS DISEASED PERSON LOOK SO WELL AND BE SO ILL. LET ME INFORM YOU THAT WHEN I AM SEATED, COMPLETELY AT REST, MY HEART IS WORKING AT MAXIMUM CAPACITY TO PROCESS OXYGEN THROUGH MY BLOOD STREAM. CONSEQUENTLY, MANY ASBESTOS VICTIMS DIE OF HEART FAILURE. WE HAVE LOST OUR IMMUNE DEFENSE MECHANISM AGAINST THE COMMON COLD, WE QUICKLY DEVELOP PNEUMONIA AND DIE. OUR DEATH CERTIFICATES WILL STATE CAUSE OF DEATH AS HEART FAILURE, OR PNEUMONIA. I DOUBT THAT THESE CERTIFICATES WILL CONTAIN THE STATEMENT "CAUSED BY ASBESTOSIS". SHOULD WE ESCAPE HEART FAILURE OR PNEUMONIA, WHILE WE SLOWLY SUFFOCATE, ONLY IN THE FINAL STAGES OF ASBESTOS CAUSED SUFFERING WILL OUR PHYSICAL APPEARANCE BEGIN TO DETERIORATE, RAPIDLY, AND VISIBLY. OUR APPEARANCE WILL THEN BE COMPARABLE TO THE PATHETIC PHOTOGRAPHS OF PRISONERS RELEASED FROM THE CONCENTRATION CAMPS IN GERMANY AFTER WORLD WAR II. I DOUBT THAT ANYONE - HAVING SEEN THOSE PHOTOGRAPHS - CAN EVER FORGET THOSE STARK, VISUAL PORTRAYALS OF HUMAN SUFFERING.

YOU SEE, QUITE OFTEN IN THE EARLY STAGES, SICK LUNGS DON'T SHOW.

I WAS BORN OF DUTCH PARENTS WHO WERE STRICT DISCIPLINARIANS. I JOINED THE NAVY AT THE AGE OF 17, DURING WORLD WAR II. TO ME, MILITARY DISCIPLINE WAS AN EXTENSION OF THE STRICT RULES AT HOME. I WAS INJURED IN THE PHILIPPINES AND HONORABLY DISCHARGED IN 1946.

WHEN I WENT TO WORK FOR INDUSTRY, I JUST KNEW THAT THEY (LIKE MY PARENTS) WOULD NEVER KNOWINGLY LET ME DO ANYTHING THAT WOULD HARM ME. I FELT THAT IF I WORKED HARD AND APPLIED MYSELF I WOULD BE REWARDED AND PROTECTED. PERSONALLY, I FEEL IT WOULD HAVE BEEN MORE MERCIFUL FOR ME TO HAVE BEEN KILLED IN ACTION WHILE DEFENDING OUR NATION THAN TO DIE THIS LINGERING DEATH INFLICTED UPON ME BY INDUSTRY, WHOSE RIGHT TO OPERATE (AND MAKE MONEY), I HELPED TO PRESERVE.

IN 1957 I WENT TO WORK FOR WHAT WAS THEN KNOWN AS THE JOHNS-MANVILLE PLANT IN STOCKTON, CALIFORNIA. I WORKED FOR JOHNS-MANVILLE FROM 1957 TO 1966. WE WERE CONSTANTLY EXPOSED TO ABESTOS FIBERS THROUGHOUT THE ENTIRE PLANT.

I BELIEVE THAT THE MOST SERIOUS EXPOSURE WE HAD WAS WHENEVER WE DID THE PLANT CLEAN-UP, ABOUT ONCE EVERY SIX MONTHS. NOW, YOU HAVE TO GET THE PICTURE: THE PLANT IN ONE AREA IS THREE FLOORS HIGH. IT HAS STEEL GIRDERS AND STEEL BEAMED CONSTRUCTION OVER THE MACHINERY AND EQUIPMENT. WE HAD TO BEGIN AT THE UPPERMOST STEEL BEAMS AND GIRDERS WITH AN AIR HOSE, BLOWING THE DUST FROM THESE BEAMS - AND, AS WE WORKED OUR WAY DOWN, WE WOULD THEN BE BLOWING IT FROM THE TOP OF THE MACHINERY AS IT SETTLED. EVENTUALLY, (AND THIS TOOK DAYS) ALL THE DUST WAS BLOWN TO THE FLOOR LEVEL WHERE IT WAS SWEPT UP AND HAULED AWAY.

MANAGEMENT NEVER TOLD US ASBESTOS DUST WAS HARMFUL. THE ONLY THING I KNEW ABOUT ASBESTOS WAS THE USE TO WHICH IT WAS APPLIED.

BECAUSE OF ALL THIS DUST, WHEN WE LEFT THE PLANT, WE HAD ASBESTOS IN OUR HAIR AND ON OUR CLOTHING. WE CARRIED IT INTO OUR AUTOMOBILES, WE WENT HOME, WE HUGGED OUR KIDS AND FAMILIES, OUR WIVES WOULD SHAKE OUT OUR CLOTHES BEFORE WASHING. WE WERE THE "TYPHOID MARYS" OF OUR ERA BECAUSE WE WALKED OUT OF THE PLANT CARRYING DEATH HOME WITH US - ALONG WITH OUR EMPTY LUNCH BUCKETS.

NOW, ALL OF THIS OCCURRED BEFORE THE EXISTENCE OF THE EXCELLENT HEALTH AND SAFETY DEPARTMENTS WITHIN ORGANIZED LABOR OF TODAY; AND, OF COURSE, THE FEDERAL OCCUPATIONAL HEALTH AND SAFETY ACT WAS ALSO NOT IN EXISTENCE.

IN 1977, WHEN THE TIME BOMB OF ASBESTOS EXPLODED WITHIN MY CHEST, MY AMERICAN DREAM TURNED INTO A NIGHTMARE. MY INCOME-PRODUCING DAYS HAD STOPPED - FOREVER!

MY TOTAL LIFE WAS TURNED UPSIDE DOWN AND INSIDE OUT. I WAS TRANSFORMED FROM A HARD-WORKING, PROUD INDIVIDUAL TO A NOTHING. THE GLOOM AND DEPRESSION THAT SETTLED UPON ME LED TO THE BRINK OF SUICIDE - I'LL NEVER KNOW WHAT STOPPED

ME FROM TAKING MY LIFE THAT ONE AFTERNOON WHEN I HAD SPREAD A PLASTIC SHEET ACROSS THE BED SO THAT AFTER I SHOT MYSELF WITH MY GUN, MY BLOOD WOULD NOT SOIL THE BEDDING. I HAD THE GUN TO MY HEAD - MY FINGER WAS ON THE TRIGGER - AND I WAS PREPARED - WHEN SUDDENLY, WITHIN ME, A LITTLE VOICE SEEMED TO SAY "WAIT A MINUTE". FROM THAT TIME ON MY LIFE SEEMED TO CHANGE. THE DEPRESSION REMAINED WITH ME FOR QUITE SOME TIME - BUT EACH DAY TO A LESSENING DEGREE.

AS TIME PROGRESSED, I BECAME AWARE OF CERTAIN FACTS THAT I HAD NOT KNOWN BEFORE: SUCH AS, THAT THE INDUSTRIES AND THE GOVERNMENT KNEW ASBESTOS WAS A KILLER BEFORE I WAS BORN. BUT THEY DIDN'T WARN ME. I ALSO BECAME AWARE OF THE TOTAL INADEQUACIES OF ALL COMPENSATION PROGRAMS TOWARD THE WOUNDED WORKERS OF OUR NATION, AND I FEEL THIS IS TOTALLY WRONG.

MY WIFE, ALI, AND I LEARNED WHILE ON VACATION THAT I BREATHED MUCH MORE EASILY ON THE COAST NEAR THE OCEAN THAN I DID AT OUR HOME IN FRESNO, CA, WHICH IS IN THE SAN JOAQUIN VALLEY, A FARMING COMMUNITY. I DIDN'T HAVE TO USE MY PORTABLE OXYGEN UNIT QUITE SO MUCH THERE, AND I COULD FUNCTION MUCH BETTER.

ALI, A 23 YEAR MEMBER OF THE AMERICAN POSTAL WORKERS UNION, TRANSFERRED HER JOB WITHIN THE POSTAL SERVICE. WE SOLD OUR HOME AND MOVED TO THE COAST, LEAVING OUR FAMILY AND FRIENDS BEHIND FOR A TOTALLY STRANGE AREA, IN THE HOPES WE COULD BUY ME A LITTLE MORE TIME FOR LIVING.

ALL DURING THIS PERIOD OF TIME I WAS BEING DRAGGED THROUGH THE LENGTHY PROCEDURES REQUIRED BY OUR WORKERS COMPENSATION SYSTEM. MY INCOME HAD STOPPED - I WAS DEPENDENT ON DISABILITY. THE HOSPITAL BILLS WENT ON, PAID FOR OVER THE YEARS BY MY WIFE'S INCOME AND MY DISABILITY. WE WERE FORCED TO PAY OVER $11,000.00 IN MEDICAL BILLS BECAUSE THE INSURANCE COMPANIES HAD CUT ME OFF, SAYING IT WAS AN OCCUPATIONAL INJURY.

IN COMPARISON, I AM ONE OF THE LUCKY ONES. I WAS RECENTLY GIVEN A HOSPITAL BILL - 18 FEET LONG, WHICH TOTALED OVER $36,000.00. THE BILL, INCURRED BY AN AVA

MEMBER, WAS FOR 42 DAYS OF CARE. THIS WAS THE 14TH TIME HE HAD BEEN HOSPITALIZED, AND HE DIED SHORTLY THEREAFTER.

I HAD WORKED FOR A LIVING, I PROVIDED FOR MY OWN NEEDS AND THE NEEDS OF MY FAMILY. I CONTRIBUTED TO THE SOCIAL PROGRAMS OF OUR COMMUNITY. I PAID TAXES SO OUR STATE AND FEDERAL GOVERNMENT COULD FUNCTION. I HAVE NOT BEEN ONE OF THE FREE-LOADERS AT EITHER END OF OUR SOCIETY'S FINANCIAL STRUCTURE.

CONSEQUENTLY, I FIRMLY BELIEVE THAT WHEN A PERSON IS DISABLED BECAUSE OF THEIR EMPLOYMENT - THEY SHOULD BE COMPENSATED IMMEDIATELY AND ADEQUATELY. UNFORTUNATELY, THIS IS NOT THE CASE. IN FACT, OUR STATE AND NATIONAL COMPENSATION SYSTEMS ARE NOTHING BUT A SAD, SICK JOKE!

I FILED FOR WORKERS COMPENSATION IN OCTOBER 1977. IN 1980, MY CASE WAS FINALLY SETTLED - MY NET AWARD WAS $8,932.50. THEREFORE, MY NET INCOME AS A RESULT OF THIS WORKERS COMPENSATION AWARD - BETWEEN 1977 AND 1984 HAS BEEN A MERE PITTANCE OF $1,276.07 PER YEAR.

THE STATE OF CALIFORNIA VIEWS ASBESTOSIS AS A TEMPORARY DISABILITY. THIS MEANS THAT EVERY FIVE YEARS WE MUST GO THROUGH THE HUMILIATING AND DEMORALIZING EXPERIENCE OF RE-QUALIFYING FOR COMPENSATION. IF, DURING THE FIVE YEARS ASBESTOSIS GOES INTO TEMPORARY REMISSION, THAT WILL END FOREVER ALL POSSIBILITIES OF ANY FUTURE CLAIMS. SHOULD WE BECOME PHYSICALLY WORSE IN THE 6TH YEAR, WE WOULD HAVE NO RECOURSE.

I CONSIDER AN AMPUTATED ARM A "TEMPORARY DISABILITY". THE PERSON CAN BE FITTED WITH A PROSTHESIS AND REHABILITATED FOR GAINFUL EMPLOYMENT.

BUT FOR US THERE IS NO HOPE. ASBESTOSIS IS NOT REVERSIBLE AND BECOMES PROGRESSIVELY WORSE AS TIME GOES ON; THERE IS NO PROSTHESIS FOR SICK LUNGS!

IN CALIFORNIA WE HAVE A LAW, AB 946, WHICH WAS PASSED TO ENABLE ASBESTOS VICTIMS TO RECEIVE COMPENSATION DURING THEIR LENGTHY LITIGATION. AFTER ONE YEAR OF OPERATION FOR AB 946, ONLY 8 CASES HAD BEEN PROCESSED, PAYING AN AVERAGE OF

$2,437.50 EACH. A TOTAL OF $12,000.00 WAS SPENT ON MEDICAL EXAMINATIONS AND A TOTAL OF $125,000.00 WAS SPENT FOR SALARIES AND ADMINISTRATIVE COSTS.

FOR ASBESTOS VICTIMS, DEALING WITH THE COMPENSATION AND SOCIAL SECURITY SYSTEMS IS LIKE TRYING TO PUNCH SMOKE. IT WOULD BE ENOUGH TO DRIVE A HEALTHY PERSON CRAZY, BUT TRYING TO DEAL WITH THIS INCESSANT PETTY HARASSMENT WHEN YOUR BODY AND YOUR LIFE ARE FALLING APART AT THE SAME TIME, DRIVE MANY OF US OVER THE BRINK - TO SUICIDE.

THROUGHOUT THE ENTIRE UNITED STATES THE ASBESTOS VICTIM IS TREATED WITH CONTEMPT. WE ARE MADE TO FEEL LIKE THE CRIMINAL - INSTEAD OF THE VICTIM.

OUR DILEMMA IS SUMMED UP BY AN ARTICLE WRITTEN BY MARK REUTTER FOR "THE NATION", MARCH 15, 1980, WITH THE FOLLOWING QUOTE FROM A LABOR DEPARTMENT OFFICIAL: "WHAT IT REALLY COMES DOWN TO", REFERRING TO THE DISABLED AMERICAN WORKERS, "IS THAT NOBODY WANTS THESE PEOPLE. THEY CAN'T WORK, THEY AREN'T ORGANIZED, THEY DON'T EVEN PAY UNION DUES".

IT'S A FRIGHTENING THING TO BE TOLD YOU HAVE ASBESTOS LUNG DISEASE - THAT NOTHING CAN BE DONE - THAT IT BECOMES PROGRESSIVELY WORSE - IT'S IRREVERSIBLE - AND YOU CANNOT GET HONEST ANSWERS TO SIMPLE BASIC QUESTIONS.

FOR MANY, MANY YEARS, WE ASBESTOS VICTIMS HAVE BEEN DYING ALL OVER OUR COUNTRY, ONE AT A TIME, IN POVERTY, NO HEADLINES, ALONE...

THE OBVIOUS ANSWER TO ISOLATION, IS ORGANIZATION - ASBESTOS VICTIMS OF AMERICA IS THE RESULT.

BUT NOW WE MUST FACE THE TRUTH, THAT VERY SAD TRUTH. THE ACTUAL, STARK REALITY FACING ALL AMERICANS WHOSE OCCUPATION HAS BEEN THE VERY CAUSE OF THEIR CRIPPLING, DISABLING INJURIES.

WE MUST ACCEPT THE TRUTH THAT THE DILEMMA FACING THE WOUNDED WORKERS OF AMERICA HAS BEEN A FOOTBALL TOSSED ABOUT BY MANY SECTORS OF POWER AND MONEY. THEIR GOAL? TO ENHANCE THEIR PERSONAL GAINS OF POWER AND MONEY.

FOR ME, DEVELOPING AVA HAS BEEN AN EDUCATION THE AVERAGE AMERICAN COULD NEVER OBTAIN IN ANY SEMINAR OR SCHOOL OF LEARNING.

WHO CAN WE TRUST? CAN WE TRUST THE MEDICAL PROFESSION? MANY DOCTORS OF TODAY CANNOT DIAGNOSE ASBESTOSIS FROM ATHLETES FOOT. WE ARE REQUIRED TO VISIT DOCTORS WHO HAVE NEVER SEEN US BEFORE, AND YET, AFTER SPENDING FIVE MINUTES WITH US THEY WILL WRITE A 45 PAGE REPORT ON OUR ENTIRE PHYSICAL CONDITION, MINIMIZING THE EFFECT OF OUR INJURY WHICH, OF COURSE, REDUCES THE COMPENSATION THAT WE ULTIMATELY RECEIVE. THESE DOCTORS ARE APPOINTED BY THE INSURANCE COMPANIES, THE STATE AND/OR THE INDUSTRIES. THEY ARE NO MORE HEALING DOCTORS THAN I AM. IN FACT, THE MAJORITY OF THEM HAVE NOTHING BETWEEN THEIR EARS BUT DOLLAR SIGNS, AND THEIR HEARTS HAVE TURNED INTO CASH REGISTERS! BUT WE'RE REQUIRED TO SEE THESE PEOPLE, BY LAW.

CAN WE TRUST THE INDUSTRIES? IN THE PAST FEW YEARS, OLD CORPORATION DOCUMENTS HAVE BEEN UNCOVERED, PROVING BEYOND THE SHADOW OF A DOUBT THAT INDUSTRIES KNEW ASBESTOS WAS A KILLER BEFORE MANY OF US HERE TODAY WERE BORN. NOW, THEY ARE FILING BANKRUPTCY.

IF I COMMIT MURDER, THE COURTS WILL DEAL WITH ME. IF I KILL TEN OR FIFTEEN PEOPLE, I MAY BE SENT TO A MENTAL INSTITUTION. THEREFORE, IT IS TOTALLY INCONCEIVABLE TO ME THAT THE INDUSTRIES RESPONSIBLE FOR THE DEATH OF THOUSANDS AND THOUSANDS OF AMERICANS CAN FILE FOR BANKRUPTCY TO ESCAPE PUNISHMENT FOR THEIR CRIMES.

INDUSTRY LIED TO THE FEDERAL GOVERNMENT, AND ASBESTOS WAS PUT INTO SHIPS AND FEDERAL BUILDINGS. INDUSTRY LIED TO THE STATES, AND ASBESTOS WAS PUT INTO STATE BUILDINGS AND SCHOOLS. INDUSTRY LIED TO THE CONTRACTORS, AND ASBESTOS WAS PUT INTO HOMES, FACTORIES AND OTHER BUILDINGS. IRONICALLY, SOME GOVERNMENTAL AGENCIES WERE AWARE OF THE ASBESTOS HAZARDS WHILE THIS WAS GOING ON.

ALL BRANCHES OF GOVERNMENT AND SOCIETY HAVE EMPLOYEES WHO WILL DEVELOP ASBESTOS-CAUSED DISEASES. WHO WILL HAVE TO PAY? IT WILL BE THE U.S. POSTAL SERVICE, THE DEPARTMENT OF THE NAVY, THE SCHOOL DISTRICTS, FOR EXAMPLE, AS WELL AS OTHER SEGMENTS OF OUR NATION'S EMPLOYERS.

CAN WE TRUST THE GOVERNMENT?

NATIONALLY, WE ARE LED BY THOSE WHO TELL US THAT HUMAN NEEDS ARE LOW PRIORITIES: OUR CLEAN AIR ACT, THE NATION'S ENVIRONMENT, SAFETY AND HEALTH IN THE WORK PLACE, JOBS, SOCIAL SECURITY - ARE LESS URGENT THAN NEW WEAPONS SYSTEMS. WE ARE TOLD THAT THE ONLY WAY TO HAVE PEACE IS TO PREPARE FOR TOTAL AND APOCALYPTIC WAR. WHEN JOBS ARE LOST, WE ARE TOLD THAT THIS IS "STRUCTURAL UNEMPLOYMENT", AS IF THIS SOURCE OF HUMAN SUFFERING WAS DIVINELY ORDAINED AND THEREFORE INDURABLE.

LOOK AT THE EPA. IT USED TO BE THAT A PROSTITUTE WAS A FEMALE ON THE STREET CORNER WITH A LARGE HANDBAG, BUT I THINK IT IS OBVIOUS TO US ALL, THAT IT CAN ALSO BE A GOVERNMENTAL AGENCY WHO HAS PROSTITUTED THEMSELVES BY SELLING OUT TO THE INDUSTRIES. THE VERY ORGANIZATION WHICH WAS CHARGED WITH PROTECTING THE ENVIRONMENT IN WHICH WE LIVE AND WITHIN WHICH WE WORK, HAS PROVEN TO US ALL THAT WE CANNOT TRUST THEM.

LOOK AT OSHA. THERE WAS AN EXPLOSION IN A GRAIN ELEVATOR IN TEXAS, THAT KILLED 18 MEN AND INJURED 22. PRIOR TO THIS ADMINISTRATION, OSHA PROPOSED A FINE OF $126,000.00 TO THE ELEVATOR OWNERS - BUT UNDER THIS ADMINISTRATION, THAT FINE WAS REDUCED TO $8,000.00, WHICH AMOUNTS TO $444.44 FOR EVERY WORKER KILLED! PROOF THAT THE DOLLAR VALUE OF EACH WORKING PERSON'S LIFE IS CONSIDERED A CHEAP COMMODITY BY THIS ADMINISTRATION. OSHA IS BEING GUTTED. WORKERS ARE BEING FIRED BECAUSE THEY REPORT JOB SAFETY HAZARDS, THEY ARE LOSING GROUND IN THEIR BATTLE FOR A HEALTHY SAFE PLACE TO WORK AND WE CAN'T DO ANYTHING ABOUT IT BECAUSE THOSE

WHO ARE CHARGED WITH THE RESPONSIBILITY OF ADMINISTERING OUR FEDERAL SAFETY LAWS ARE INSENSITIVE AND IRRESPONSIBLE.

RECENTLY, CERTAIN OSHA OFFICIALS HAVE BEEN REPLACED! ONLY TIME WILL TELL IF OSHA'S DEPLORABLE, CALLOUS DISREGARD OF AMERICA'S WORK FORCE WILL CHANGE FOR THE BETTER. BUT UNDER THE CURRENT ADMINISTRATION, PROSPECTS OF MORE STRINGENT HEALTH AND SAFETY LAWS ON THE JOB, RANGE FROM DIM TO NON-EXISTENT.

CAN WE TRUST OUR LEGISLATORS? WE RECENTLY SENT OUT A SURVEY TO AVA MEMBERS. QUESTION #30 WAS: "IF YOU HAD YOUR WAY, WHAT WOULD YOU LIKE TO SEE DONE ABOUT ASBESTOS POISONING?". ONE MEMBER REPLIED: "I WOULD HOLD THE U.S. GOVERNMENT, MY EX-EMPLOYER AND OTHERS RESPONSIBLE WHO DID NOT INFORM ME OF THE HEALTH HAZARDS, AND FORCE THEM TO BREATHE IN ASBESTOS. THAT WAY WE WOULD HAVE BETTER LAWS TO DEAL WITH". LAWS ARE BEING WRITTEN WHICH WILL REMOVE THE TORT SYSTEM NOT ONLY FROM WORKERS BUT ALSO FROM THE PRIVATE SECTOR WHOSE HEALTH HAS BEEN DAMAGED AND WHOSE LIVES HAVE BEEN LOST BECAUSE OF KILLERS INTRODUCED INTO OUR ENVIRONMENT, WITH FULL KNOWLEDGE OF THE INDUSTRIES, IN THE NAME OF PROFIT. OTHER LAWS WOULD ULTIMATELY SHIFT THE BURDEN OF PAYING FOR INDUSTRY-CAUSED SUFFERING AND DEATH FROM THOSE RESPONSIBLE, ON TO YOU, ME, THE TAXPAYER.

SENATOR ROBERT W. KASTEN (R-WIS) HAS PROPOSED A PRODUCT LIABILITY BILL, WHICH WOULD (AMONG OTHER NEGATIVE POINTS) ABOLISH THE RIGHT OF TORT SUITS FOR ASBESTOS WORKERS WITHOUT PROVIDING ANY IMPROVEMENT AT ALL OVER PRESENT MISERABLE COMPENSATION LAWS.

COMPANIES AND CONGRESS MUST UNDERSTAND THAT THEY WILL BE HELD ACCOUNTABLE UNLESS THEY WILL MAKE EVERY EFFORT TO PROTECT AND COMPENSATE THE WORKERS AND SOCIETY.

WHAT USED TO BE A GOVERNMENT OF THE PEOPLE, BY THE PEOPLE AND FOR THE PEOPLE, IS NOW A GOVERNMENT OF THE GASOLINE COMPANIES, BY MANUFACTURING INDUSTRIES, FOR THE UTILITY COMPANIES.

WHO MADE THIS NATION GREAT? DID THE INDUSTRIES MAKE IT GREAT? ABSOLUTELY NOT, IT WAS YOU AND ME, THE PEOPLE WHO WORKED AND PAID OUR TAXES, THAT MADE THIS COUNTRY GREAT. IN THESE DAYS OUR RIGHTS ARE BEING TAKEN AWAY. THOSE WHO HAVE EXPENDED THEIR LIVES WORKING AND ARE NOW DEPENDENT UPON SOCIAL SECURITY ARE BEING THREATENED. THE TRICKLE DOWN THEORY HAS TRICKLED ON DOWN PAST THE PEOPLE DESERVING, THOSE WHO HAVE MADE THIS NATION GREAT, INTO SOUTH AMERICA AND OTHER PLACES WHERE WE DON'T BELONG.

TO SOME, MONEY IS POWER, AND POWER IS EVERYTHING! I AM ONLY AN ASBESTOS VICTIM WITH WILL-POWER!

IN THE CONTEXT OF THIS IMAGERY OF HOPELESSNESS, POWERLESSNESS AND LOWLY PRAGMATISM, WHAT IF ANYTHING, CAN BE DONE?

ORGANIZED LABOR AND THE PUBLIC SECTOR MUST BE SUPPORTIVE AND GET BEHIND ASBESTOS VICTIMS OF AMERICA. WE WILL BE THE EXCLAMATION POINT TO THE DEMANDS OF SAFETY AND HEALTH ISSUES, AS WELL AS ADEQUATE COMPENSATION FOR EMPLOYMENT INJURIES. WE WILL SAY: "MR. AND MRS. AMERICA, YOU HAD BETTER LISTEN TO US, THE 'WOUNDED WORKERS' OF THIS NATION. WE ARE YOUR UNCLES, WE ARE YOUR NEIGHBORS, WE ARE YOUR GRANDPARENTS, AND WE ARE CREDIBLE, WHEREAS THE INDUSTRIES AND THE GOVERNMENT ARE INCREDIBLE. WE DEMAND TO BE COMPENSATED FOR OUR OCCUPATIONAL INJURIES, WE DEMAND HEALTHY, SAFE PLACES FOR OUR WORKERS OF TODAY AND THE GENERATIONS TO COME, BECAUSE IN THESE FUTURE GENERATIONS LIES THE FUTURE OF AMERICA. WE DEMAND THE RIGHT TO LIVE OUR LIVES IN DIGNITY, NOT POVERTY".

WE, AT AVA, OPPOSE S.1265, THE "ASBESTOS WORKERS RECOVERY ACT".

WE CANNOT SUPPORT ANY LEGISLATION WHICH ATTEMPTS TO ELIMINATE OUR CONSTITUTIONAL RIGHTS, SUCH AS THE TORT SYSTEM. IT MATTERS NOT WHETHER INJURIES, SUFFERING AND DEATH ARE INFLICTED BY A DRUNKEN DRIVER ON A HIGHWAY, OR CORPORATE AND GOVERNMENTAL DECISIONS AFFECTING THE HEALTH AND LIVES OF THIS NATION'S MOST PRECIOUS RESOURCE - ITS WORKERS.

AFTER I DIE, IT WILL NOT MATTER TO ME WHETHER MY SUFFERING AND DEATH WERE CAUSED BY A KNIFE, A GUN, OR ASBESTOS FIBERS - AT THE HANDS OF MURDERERS INSIDE OR OUTSIDE A CORPORATION OR GOVERNMENTAL AGENCY.

TO DENY US OUR DAY IN COURT TO ACHIEVE JUSTICE (WHERE THERE HAS BEEN LITTLE OR NONE) IS CLEARLY A VIOLATION OF OUR CONSTITUTIONAL RIGHTS.

THE TWO-TIERED SYSTEM OF FIRST PROCEEDING THROUGH WORKERS COMPENSATION AND AFTER THAT BEING REQUIRED TO FILE A CLAIM AGAINST OUR SOCIAL SECURITY SYSTEM, MAY REQUIRE YEARS AND YEARS OF EFFORT. THIS OBVIOUSLY FAVORS THE INDUSTRIES RESPONSIBLE FOR OUR INJURIES, AS THEIR POCKETBOOKS ARE UNAFFECTED AT ALL DURING THESE LENGTHY PROCEDURES, WHILE THE VICTIMS' FINANCIAL RESOURCES ARE COMPLETELY DRAINED. AND FOR WHAT? THE PROSPECT OF A MEAGER PITTANCE TOWARDS EXISTING IN TODAY'S ECONOMY IS INDEED A VERY DEMORALIZING, DISGRACEFUL DILEMMA FOR A ONCE PROUD WORKER AND HIS FAMILY TO FACE.

MY TESTIMONY, PLUS WHAT HAS OCCURRED IN OTHER VICTIMS' LIVES, CANNOT BE DISREGARDED COMPLETELY BY THE LEGISLATIVE DECISION-MAKERS OF OUR NATION.

NOR CAN THESE SAME LEGISLATIVE DECISION-MAKERS BE PERMITTED TO ENACT LAWS PROTECTING NEGLIGENT (YES, EVEN THE CRIMINALLY NEGLIGENT) INDUSTRIES INVOLVED.

THE ELIMINATION OF THE TORT SYSTEM, COUPLED WITH THE TIME-CONSUMING, DEGRADING EFFORT REQUIRED BY A TWO-TIERED COMPENSATION SYSTEM, ARE JUST TWO OF THE MANY REASONS ASBESTOS VICTIMS OF AMERICA FINDS S. 1265, THE "ASBESTOS WORKERS RECOVERY ACT", TOTALLY UNACCEPTABLE AND IMPROPER. TO SAY THE VERY LEAST, IT IS A DISGRACEFUL PIECE OF LEGISLATIVE GARBAGE WHICH MERELY ADDS INSULT TO OUR INJURIES.

THE FACT IS - AMERICA IS ON THE TIP OF THE ICEBERG OF THE BIGGEST EPIDEMIC OF MASS MURDER OF AMERICAN WORKERS AND CITIZENS, COMMITTED BY AMERICAN INDUSTRY, SANCTIONED BY THE AMERICAN GOVERNMENT - IN THE HISTORY OF THIS NATION.

WHAT HAS HAPPENED TO THE ASBESTOS VICTIMS IS A SAD COMMENTARY ON A SITUATION WHICH SHOULD HAVE NEVER OCCURRED IN THE FIRST PLACE. AND, ONCE THE FACTS WERE KNOWN (AS THEY HAVE BEEN FOR MANY YEARS), ACTION BENEFITING THE ASBESTOS DISEASED AND DYING SHOULD HAVE BEEN ENACTED IMMEDIATELY. FURTHER, THE CORPORATE AND GOVERNMENTAL INDIVIDUALS INVOLVED SHOULD BE PUNISHED WITH VERY REAL PRISON SENTENCES AND/OR HUGE FINANCIAL PERSONAL PENALTIES TO ASSURE OTHERS SO TEMPTED THAT MURDER BY AMERICAN INDUSTRY, SANCTIONED BY THE AMERICAN GOVERNMENT WILL NO LONGER BE TOLERATED. FOR ANY REASON!

THE "ASBESTOS WORKERS RECOVERY ACT" DOES NOT PROVIDE A PROMPT OR EQUITABLE SYSTEM FOR COMPENSATING VICTIMS OF ASBESTOS. INSTEAD, THE ACT PROVIDES A MEANS BY WHICH THE ASBESTOS INDUSTRIES CAN GREATLY REDUCE THEIR FINANCIAL (AND MORAL) RESPONSIBILITY TO THEIR VICTIMS.

BECAUSE OF THIS, I SUGGEST THIS ACT BE REFERRED TO AS THE "ASBESTOS INDUSTRIES FINANCIAL PRESERVATION ACT".

PLEASE BEAR IN MIND THAT WE, THE VICTIMS ARE NOT THE PROBLEM - PEOPLE WHO DON'T CARE ABOUT PEOPLE ARE THE PROBLEM.

TAKE IT FROM ME, DYING IS A TOUGH WAY TO MAKE A LIVING.

STATEMENT
on
COMPENSATION FOR OCCUPATIONAL DISEASE
for submission to the
HEALTH SUBCOMMITTEE
of the
SENATE FINANCE COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Samuel A. Roth*
September 30, 1985

The Chamber of Commerce of the United States is pleased to have the opportunity to comment on compensation for occupational disease.

Summary of Chamber Position

The Chamber has long supported provision of adequate and equitable compensation for occupationally caused disability through a sound state workers' compensation system. We also support an equitable product liability tort system for the protection of the public.

Occupational disease is a serious societal problem, although there is considerable disagreement over its dimensions. Although rare, workers become ill and in some cases have died, as a result of their job. Our members, all of whom are employers, despair over any job-related illness. In those cases where workers are hurt on the job, our members want, in place, a fair, cost-effective workers' compensation system for injury, including disability which may arise out of and in the course of employment.

For some of our manufacturing members, product liability tort litigation resulting from workplace asbestos exposure has the catastrophic potential of bankruptcy. Others, who are insurers, face payments on policies based on premiums that did not anticipate present losses. Moreover, all elements of the business community are concerned that there not be any workplace exposure that could lead to health effects not recognized at present.

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Occupational disease can be costly for workers and businesses alike. Thus, a fair system of compensation is needed. At present, workers' compensation and product liability are the two principal systems that compensate workers who develop occupational disease. However, their adequacy, equity, and efficiency have been sharply questioned.

Admittedly, both systems have flaws which need remedies, but we have reached the judgment that the compensation systems in place fairly well serve their intended purpose. At the same time, we are committed to making improvements in them. Moreover, we do not believe that any deficiencies in workers' compensation are responsible for product liability problems, and we question the need for changing the nature of the state compensation programs in response to the fact and perception of such problems. Furthermore, we strongly oppose federal programs designed to replace, supplant, or supplement state workers' compensation, a policy reaffirmed by the U.S. Chamber Board of Directors several times.

In recognition of the present awareness and state of understanding of long latency diseases, problems such as asbestos, as well as other potential product exposure problems, including those in the evironment, the Chamber recently has taken a significant step to seek and recommend new policies and proposals for dealing with exposure of workers and others to toxic or potentially toxic substances and any related disease or disability resulting therefrom. Modern times require modern approaches and that is what we believe we have accomplished through our ad hoc National Business Council on Injury Compensation. A description of the ad hoc Council and its recent report is contained in a later section of this statement. We also have provided copies of this report to each member of Congress.

The Present Myth of Personal Harm

The Chamber shares the concern of this Subcommittee and the public for any person who may suffer illness or disability as a result of exposure to toxic substances. Certainly, there is a public perception of a growing incidence of long-latency diseases from exposure to hazardous substances, brought about in large part by news media attention. This perception is contradicted by epidemiological data showing that the overall incidence of occupational diseases and of all cancers (except respiratory cancer) has held steady or declined since 1933. We do know that great strides have been made in the safe handling and management of substances that otherwise would pose threats to health and safety, and thus tragedies are being averted. Such accomplishments must be continued and expanded.

Moreover, the public's belief that causal relationships are well established between exposure to hazardous substances and long-latency diseases is not based in fact. Science and medicine have made clear linkages between substances and/or exposure and specific diseases in only a few isolated cases. For medical reasons, they are not likely to expand the list greatly in the near future.

Fortunately, several comprehensive studies are now under way to examine the scope of the problem of environmental exposure. The Chamber has contributed to one such study conducted by Universities Associated for Research and Education in Pathology.[1/] The results of this work will be supplemented by the investigation now being conducted for the Environmental Protection Agency by the Center for Disease Control. The several studies of environmental exposure completed so far do not support the perception, or hypothesis, that there is a linkage between environmental exposures and diseases, no doubt due to environmental controls.

It has been suggested that the sizeable number of product liability tort suits arising from workplace exposure to asbestos indicates that there is an epidemic of occupational disease. However, medical science has found that even among this population not every claim is a proven case of impaired lung function or other specific illness caused by asbestos. In fact, many individuals who are diagnosed as having "asbestosis" actually have an asymptomatic condition which shows up on X-rays but is benign. It is the fear of asbestosis and asbestos-related cancer that is widespread.

[1/] Health Aspects of the Disposal of Waste Chemicals. Universities Associated for Research and Education in Pathology, Inc. Bethesda, Maryland. 1985.

Coupled with this fear are misunderstandings and erroneous "conventional wisdom." In testimony before the Senate Labor Subcommittee,[2/] both Dr. Paul Wheeler of the Department of Radiology and Radiological Science of the Johns Hopkins Medical Institutions and Dr. Robert N. Jones of Tulane University School of Medicine, who testified on behalf of the American Lung Association and American Thoracic Society, questioned the general accuracy of the diagnoses of asbestos-related diseases. They believe that principles of medical diagnosis have been abrogated in the asbestos field and that various draft bills have not dealt adequately with medical criteria for the conditions to be compensated. Dr. Jones stated, "public policy in this area should be based on scientific information."

Although asbestos is one of 19 chemical substances or industrial processes proven carcinogenic,[3/] there are still medical questions raised when consulting the primary cancer literature. Papers from the Sloan-Kettering Cancer Center introduce significant uncertainties about asbestos-related mesothelioma. Malignant mesothelioma is a rare disease with an incidence of 2.2 cases per million population per year.[4/, 5/]

In a review of 123 patients diagnosed with malignant pleural mesothelioma, the largest series of patients from a single institution so far accumulated, the Sloan-Kettering researchers found that only 16 patients related a history of exposure to asbestos. Fourteen of the patients had a history of previous lung disease; one had received prior radiation to the

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[2/] P.S. Wheeler, "Asbestos-Related Litigation: A Scientific Perspective and Solution," and R.N. Jones, "Public Responsibility in Asbestos-Related Diseases," before the Subcommittee on Labor, Senate Labor and Human Resources Committee, April 24, 1984.

[3/] "Carcenogenic Risks. Strategies of Intervention." Report 25, World Health Organization, International Agency for Research on Cancer. Geneva. 1978.

[4/] J. Brenner, P.P. Sordillo, G.B. Magill and R.B. Golbey. Malignant Peritoneal Mesothelioma - Review of 25 Patients. Am. J. Gastroenterol., 1981, 75: 311-13.

[5/] Malignant Mesothelioma of the Pleura, Review of 123 Patients. Cancer, 1982, 49:2431-5.

chest; and 14 had been exposed to industrial dusts and chemicals.[6] This finding, that not all pleural mesotheliomas are related to asbestos, is consistent with a review of the literature stating that only from 10 to 70 percent of patients with malignant mesothelioma had been exposed to asbestos.[7]

The general conclusion appears to be that exposure to asbestos is an important etiologic factor but that other factors include serious lung disease, tuberculosis, chemical pneumonia, radiation or industrial dusts and chemicals other than asbestos.

The Sloan-Kettering team, in a review of malignant peritoneal mesothelioma, found no evidence of asbestos linkage.[8] They also reported that 20 percent of malignant mesotheliomas originate in the peritoneum.

The saddest aspect of this disease is that malignant mesothelioma is found in children. In a review of seven cases, the origin was at the pleura in six and one at the periotoneum. None of the patients related a history of exposure to asbestos.[9]

This is not intended to be a comprehensive review of the literature but instead to raise questions about the conventional wisdom surrounding asbestos-related diseases. In the absence of definitive information about rare diseases, we should proceed carefully in the formulation of public policy. As noted in the citations, such public policy should be based on good science. Both compassion and caution are required.

6/ Ibid.

7/ K.H. Antman. Malignant Mesothelioma. N. Engl. J. Med., 1980, 303:200-2.

8/ Brenner, Sordillo, Magill and Golbey. 311-13.

9/ J. Brenner, P.P. Sordillo and G. B. Magill. Malignant Mesothelioma in Children: Report of Seven Cases and Review of the Literature. Medical and Pediatric Oncology, 1981, 9:367-73.

Workers' Compensation For Job-Related Disability

As the record clearly demonstrates, workers' compensation -- a nearly 100-year old concept -- has proved to be a reasonably efficient method of protecting employers and their employees against the financial risks of job-caused disabilities, while motivating job-place safety and promoting the rehabilitation of injured workers.

It is premised on a quid pro quo. In exchange for certainty and promptness in receiving full medical care and a reasonable level of wage replacement for job-related injuries or diseases, even when they are at fault, workers give up the right to sue their employers for unlimited damages (the "exclusive remedy" doctrine). Employers give up the opportunity to reduce or avoid liability by proving that the employee was at fault but gain protection against unlimited liability. Both workers and employers escape the cost, uncertainty, and delay of litigation, and the public benefits from a reduced caseload in the welfare and judicial systems.

The workers' compensation system essentially consists of 56 separate programs. There is one for each state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and American Samoa. There also are two federal programs, the Longshore and Harbor Workers' Compensation Act (Longshore Act) for maritime workers nationwide and the Federal Employees' Compensation Act (FECA) for federal government workers. The Longshore and FECA programs figure prominently in the discussion of compensation for diseases related to asbestos exposure, because much of it occurred in naval shipyards in World War II. There also is a Federal Black Lung program for coal miners and their families, which is intended to compensate for pneumoconiosis caused by exposure to coal dust.

When workers' compensation was carved out of the tort system, it was intended to be neither a new form of damages nor a retirement program. Today, its focus is on encouraging return to gainful employment. Consequently, eligibility for compensation is determined by injury in the course of employment that causes disability (i.e., loss of wages). To preserve the work incentive, cash benefits typically replace two-thirds of the worker's pay (in addition to full medical expenses). No compensation is payable for pain and suffering, loss of consortium, or other intangible losses, nor are there punitive damages.

In recent years, workers' compensation costs have become a major business expense for many employers. According to the Social Security Administration, the total cost to employers in 1982 (the most recent year for which statistics are available) was just over $22.5 billion -- an increase of more than 450% since 1970. The average cost per employee per year, according to the U.S. Chamber's Employee Benefits 1983 survey, was $258, although the average by industry is as high as $729 (for primary metal industries). The cost varies by occupations and jurisdiction (in 1984, Longshore Act insurance in the New York City port area costs as much as $21,000 per year for a longshoreman earning $24,000). In addition, the cost of workers' compensation insurance is adjusted according to the experience of each employer. Experience rating gives employers incentive not only to hold down costs through preventive measures but also to contest invalid claims. This latter "watchdog" effect is essential to police the program against fraud and abuse. No government agency has the motivation or information to be as effective as the employer in this respect.

Occupational Diseases Are Covered by Workers' Compensation

Appended to this statement is the chart on occupational disease coverage from our Analysis of Workers' Compensation Laws 1985 (Appendix I). As this chart reflects, all occupational diseases are covered on a compulsory basis under all workers' compensation laws, including FECA and the Longshore Act. Benefits for diseases are the same as for traumatic injuries, and medical care is unlimited. Contrary to statements published in the news media, statistics compiled by the National Council on Compensation Insurance and other data confirm that claimants, in fact, do apply for and receive benefits for disability or death caused by occupational disease. However, such claims are a tiny fraction of workers' compensation claims - around one percent, representing two percent of total benefit costs.

Workers' compensation laws have been criticized as having arbitrary "barriers" that unfairly exclude legitimate claims. It is true that all workers' compensation laws contain statutes of limitations governing timeliness of claims filing. However, recognizing that some diseases have long latency periods, today most states allow claimants to file within a reasonable time after the disability occurs and the claimant knows or should know that it is traceable to employment. A minority of states have a limitation running from the date of last employment or last exposure. Some states, but not the federal Longshore or FECA programs, require that disability occur within a year or two after last exposure, and a small minority of states have minimum length-and/or-location-of-exposure requirements. Such provisions would not disqualify a claimant who has worked continuously for one employer but may disqualify an individual who has changed jobs frequently (for whom accurate information on employment or exposure may be unavailable).

Workers' compensation laws provide benefits at the same level whether disability is caused by disease or traumatic injury. However, because of the long latency and/or complex etiology of many diseases, actual awards may differ. For example, in a minority of jurisdictions,[10] benefits are computed according to wages paid at the time of last exposure and thus may not be representative of actual earnings loss in cases where the disease does not manifest itself until years later. Furthermore, if there is uncertainty over causation, liability, the degree of impairment, or similar issues, the parties may settle the claim voluntarily at a mutually agreed figure that reflects these uncertainties.

State Reforms of Workers' Compensation Laws

Workers' compensation certainly has its imperfections. Although it is risky to generalize because each of the 56 programs is different, many of them have deficiences that include insufficient emphasis on rehabilitation and early return to work, an alarming trend of judicial decisions creating exceptions to the exclusive remedy doctrine, increasing resort to litigation in a system designed to avoid the need for legal representation, and a disproportionate share of benefits paid to individuals with relatively minor injuries. Of course, for employers the overwhelming problems are the rapidly escalating burden of payroll costs and loss of productivity, especially acute for small business. Proposals for changes in a state's coverage of occupational diseases must be considered in the context of other problems that may affect a far greater universe of claims.

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[10] It is impossible at present to classify every state, because some never have had to address the issue, and others have conflicting precedents.

Public awareness of the need for improving workers' compensation may have been greatest following the 1972 report of the National Commission on State Workmen's Compensation Laws, but successful reform efforts have been continuous. The U.S. Chamber has long urged our membership to work for and support needed improvements in state and federal job injury laws. In addition, we have been active in seeking needed reform of the present federal programs.

Reform and modernization efforts by all interested parties have led to major improvements in benefits and coverage, which we have tracked in the Analysis. In 1972, for example, only nine states had a maximum weekly benefit over $80.00. Today, however, the average maximum is approximately $322.00. (See Appendix II.)

The reforms also have included substantial improvement in coverage of occupational diseases. There has been remarkable progress since the Chamber first began tracking disease provisions of state laws. For example, in 1944 only 28 states were included in the occupational disease chart, and only eight of those states had compulsory coverage of all diseases. By 1970, all states covered diseases, but 15 still covered only those diseases listed by statute in a schedule. Today, however, all states either have abolished schedules of covered diseases or amended their laws to include all occupational illnesses not listed. Only a few states now deny compensation for partial disability in case of certain diseases, and all arbitrary limits on medical care for diseases have been repealed. Provisions for lower benefits in case of disability caused by disease have been abolished in all states.

Statutes of limitations have been extended for diseases with long latency periods. The majority of states now allow claims within a reasonable time after discovery of the disability and its relationship to employment. Even states with limitations running from last exposure or last employment have made exceptions for illnesses known to have long latency periods, such as diseases caused by radiation. A trend is under way in these states to apply similar rules to other long latency diseases. For example, last year alone, Alabama amended its law to allow claims for disability or death relating to occupational disease to be filed within two years (instead of one year); Illinois provided that a claim for asbestosis be filed within 25 years of last exposure; and New York expanded its time limit on claim filing to allow claims within two years of when claimant knows/should know relation to employment, while Washington and North Carolina now also will allow claims filed within two years of notification by competent medical authority. Other states have made similar changes in the past few years.

Efforts to speed up the reform process even more are now under way. A report on occupational disease prepared by Crum and Forster Insurance Companies, Inc., documenting the nature of the problem and recommending specific changes in state law, has been well received and widely publicized.

A business and insurance task force on occupational disease under the aegis of the National Association of Insurance Commissioners (NAIC) and the International Association of Industrial Accident Boards and Commissions (IAIABC) recently has completed its own recommendations.

The NAIC Occupational Disease Advisory Committee's report 11/

11/ The Subcommittee should know that organized labor, while an official member of the NAIC Advisory Committee, failed to remain an active participant after the first few meetings. In a separate development, the AFL-CIO has formed a new legal rights foundation whose stated purpose is to try selected cases involving the cornerstone of workers' compensation systems -- the exclusivity doctrine. This reflects their belief that the doctrine hold only in cases where the employee is at fault. We believe that this is an unfortunate decision by the leadership within organized labor and we continue to monitor the situation, since continued employer support for workers' compensation is predicated upon preservation of the exclusivity doctrine.

findings and accompanying conclusions were endorsed by the full NAIC on June 9, 1985, and we expect the report will be made available to policymakers and interested parties at the federal and state level. The NAIC Advisory Committee conclusions are significant for many reasons. The Committee:

- reaffirmed its support for and faith in state workers' compensation systems for injuries of all types, including occupational disease;
- recognized that the current problems involving asbestos litigation arise because of problems in tort law rather than workers' compensation and suggested that workers' compensation systems not be distorted in hopes of solving the problems of tort law, but also recognized that the overlap between the two systems is relevant to overall debate on occupational disease and that further research is needed to properly differentiate between the two;
- endorsed the continuing efforts to effect changes in state workers' compensation laws which remove barriers to prompt and equitable compensation to those individuals deserving of compensation;
- noted that, given current information, most state workers' compensation statutes do not contain barriers to compensation for occupational disease and that a continuation of the current claims trend into the future will not adversely affect any remaining states removing such barriers (the NAIC report does express caution, however, in that with the exact amount or volume of future claims being unknown, significant increases in such claims may adversely impact state workers' compensation systems); and,
- noted that, just as laws must be changed to assure compensation for deserving claimants, laws must also be strengthened to protect employers from liability where the illness is caused by the aging process or non-work factors or there is a low probability that the disease arose out of and in the course of employment.

The NAIC also recommended the appointment of an "interdisciplinary advisory committee to examine the appropriate interface between the tort and workers' compensation systems unless the Committee finds that other studies are covering this subject adequately." (See Appendix III.)

Further, the Executive Committee of the IAIABC, on August 21, unanimously endorsed the NAIC report's findings and conclusions. The IAIABC represents workers' compensation administrators, members of appeals boards and other state officials.

The U. S. Chamber is committed to the success of these efforts. In addition to the review of the injury compensation issue by the ad hoc council, our Council on Workers' Compensation, a standing policy committee, is working actively to assure that state workers' compensation laws are up to date with respect to compensating disability attributable to occupational disease. In late 1983, at the Council's request, our Board of Directors issued a call to action to our members, urging them to make sure that their state laws are fair and in accord with modern science. (See Appendix IV.) The Council and our staff continue to work with state business leaders to implement this process.

The Chamber recognizes that our contribution is only a small part of the equation and that there are many more related activities in progress, in both the public and private sectors. In particular, we commend this Subcommittee for these oversight hearings, which we hope will help spur states to action.

However, we must caution against undue expectations of overnight success. While we acknowledge a needed urgency for remedial action, a realistic understanding of the legislative and political process suggests that it can be time consuming. Many competing interests must be balanced, and ways found to implement improvements in benefits without driving employers out of business.

Federal Compensation Track Record

Inextricably bound in the policy debate over occupational disease is the historic question whether the state workers' compensation programs should be federalized, as advocated by organized labor.

As we have testified on numerous occasions before Congress, we strongly oppose federal programs designed to replace, supplant, or supplement state workers' compensation. We believe that, with all their imperfections, workers' compensation programs are designed and implemented best by state governments, which are more cognizant of and can be more responsive to local needs and circumstances.

Experience with the three federal compensation programs confirms the wisdom of the state approach. The Longshore Act, FECA, and the Black Lung program are all notoriously costly, slow in delivering benefits, and inefficient in weeding out questionable claims. None of this is news to this Subcommittee, which has oversight of all three.

The Black Lung Act is especially relevant to the occupational disease debate because it demonstrates the propensity of the federal government to establish costly entitlement programs in responding to this type of problem. The General Accounting Office has reported that in nearly nine out of ten cases claims are approved without medical evidence of disability caused by exposure to coal dust and that this unenviable record results from presumptions contained in the statute itself. Consequently, the Black Lung program has grown from a temporary program estimated to cost less than $90 million in toto into a permanent program costing more than $2 billion annually and contributing to the federal budget deficit.

A Black Lung Disability Trust Fund, financed by an excise tax on coal production, was established in 1978 to pay claims where the last employment was prior to 1970 or where no responsible coal mine operator could be identified. The fund was in deficit by $2.5 billion as of December 31, 1984, despite 1981 amendments that doubled the coal tax and revised eligibility criteria in an effort to make the fund solvent. Although the claims approval rate has dropped, the Reagan Administration concluded in its federal budget proposal for FY '86 that an additional coal tax is necessary. The House Ways and Means Committee recently included the coal tax increase in H.R. 3128, a package of revenue and spending provisions.

As parties involved in the current occupational disease debate and responsible for the development of public policy, we must ask ourselves if we have really learned a lesson from programs originating as a quick-fix federal panacea.

An Alternative: The Asbestos Claims Facility

We believe that all parties involved in the ongoing occupational disease debate have a sincere desire to provide prompt compensation to disabled workers. On March 19, 1985, the Senate Labor Subcommittee held a hearing on an unprecedented example of private-sector initiatives designed to extricate deserving claimants with asbestos-related diseases from the existing legal quagmire -- the formation of the Asbestos Claims Facility.

The "Wellington Facility" (named after Yale University Law School Dean Harry Wellington, who has been serving as the neutral moderator) represents a promising alternative, first for asbestos claims and ultimately for other claims. Many companies who are either manufacturers of asbestos or their insurers voluntarily conditionally have subscribed to the agreement, with the conversion to a final agreement expected within nine weeks.

In his March 19 testimony, Dean Wellington briefly described the Facility:

> It is important that the Asbestos Claims Facility is all voluntary. A plaintiff desiring to litigate through the courts will still be free to go that route, originally or at any time the plaintiff should be dissatisfied with the Facility.
>
> The signatories to the Agreement -- the Facility's members -- however, will refer all claims against them to the Facility for handling. And they will give the Facility authority to evaluate, settle, pay or defend all asbestos-related claims against them. This will greatly simplify procedures and reduce the time required to reach actual pay-out.
>
> Claimants will be required to submit certain standard information, including employment, medical and compensation history. The claimant will have to have been exposed to asbestos-containing products manufactured by one of the Facility's members and have a diagnosed asbestos-related disease.

> If a negotiated settlement cannot be reached, the Facility will offer a full range of mediation services. And, if a case cannot be settled by the "Alternate Dispute Resolution" procedure, the Facility will provide for the joint defense of all members, using a single defense team.
>
> The Facility, by the way, will be funded by its members and will be a not-for-profit corporation.

We call to this Subcommittee's attention this voluntary and meritorious effort by manufacturers, insurers, labor and the trial bar to propose a solution indeed which may prove to mitigate the need for establishing a new federal entitlement program and fairly serve the various parties.

As John L. Baldwin, President and Chief Executive Officer for the Pittsburgh-Corning Corporation also noted at the March 19 hearing:

> It is an agreement that provides a much higher level of certainty for both producers and insurers, allowing us to devote our own energies where they really should be -- seeing to it that the truly injured workers are compensated in a timely and equitable fashion.

Manville Corporation Reorganization

Another private-sector initiative to address occupational disease has been provided by the Manville Corporation, a major defendant in asbestos class action litigation. They recently announced a reorganization plan which would establish a trust fund for the payment of asbestos-related claims, administered by five trustees approved by the bankruptcy court. (Manville filed Chapter XI bankruptcy in 1982.)

The trust's $2.5 billion in assets would include an initial payment of $846.5 million, a non-interest bearing loan of $1.65 billion (payable in yearly installments), stock equalling 50 percent of the company's outstanding shares, and other provisions and conditions.

Manville is working to receive shareholder and bankruptcy court approval and has also pledged to join the Wellington Facility. The agreement was reached with a special court-appointed representative of future claimants.

It is important to note that the formation of the Wellington Facility and the announcement of Manville's trust fund demonstrate that times have changed, and that private sector solutions, while not easy, are possible. We applaud these efforts.

Product Liability Law and Occupational Disease

Workers' compensation is an individual's first avenue of protection in case of occupational injury and ordinarily constitutes the exclusive remedy against the employer. However, tort liability for injuries caused by parties outside the workplace continues independent of any right to workers' compensation.

Critics of workers' compensation charge that its inadequacies are responsible for the asbestos tort litigation. We believe otherwise -- the occupational tort litigation can be better accounted for by the differences in function and purpose between the no-fault workers' compensation system and the fault-based tort system. The fact that a substantial percentage of the asbestos tort plaintiffs are covered by the Longshore Act or FECA, the most generous workers' compensation systems in the country, confirms this belief.

No matter how generous a workers' compensation program may be, a worker has little to lose and much to gain by seeking a tort recovery. Tort cases, unlike workers' compensation, usually are handled on a contingency fee basis, and offer the opportunity to recover unlimited damages for economic and intangible losses, plus the possibility of punitive damages. Furthermore, unlike workers' compensation, a tort recovery may be possible for a physical impairment that may not cause any interruption of income (as is the case presently with respect to much of the asbestos litigation).

In fact, for tactical and other reasons, some individuals decline to file for workers' compensation, which requires an impartial medical examination, regulates attorney fees, and must be coordinated with Social Security Disability Insurance. In addition, because any workers' compensation received usually is deductible from the tort judgment or settlement, plaintiff's counsel may be reluctant to try a case twice for one recovery. In some instances, the plaintiffs' bar is unfamiliar with workers' compensation, and a separate claimants' bar handles such cases.

The tiny number of claims filed with California's special workers' compensation asbestos fund, which is specifically designed to remove barriers to compensation for workers suffering from asbestos-related diseases, may provide additional evidence that only a small percentage of asbestos plaintiffs are actually disabled by, rather than simply exposed to, asbestos.

Moreover, employers themselves may initiate tort claims against manufacturers. Except in two states, workers' compensation laws allow the employer to recover compensation benefits from any third party tort settlement or judgment.[12] Indeed, the right to sue the manufacturer typically passes to the employer after a prescribed time, if not exercised by the employee. This right is referred to as the "employer's lien" or "right of subrogation."

Existing product liability tort law is in serious need of reform. Rules determining the liability of product sellers for product-related injuries vary widely and often are in direct conflict from one state to another. Moreover, because these rules are created judicially, they may change as the judicial temperament changes. The result is a wide variation of law which is changing constantly and is totally unpredictable.

This wide variation limits the ability of manufacturers to make informed decisions regarding the design of products for nationwide distribution and sale. For this reason the U.S. Chamber has taken a strong position in favor of S. 100, the proposed federal Product Liability Act, which would bring certainty to the law and ease what has become a serious burden on interstate commerce.

12/ In Ohio, the employer may recover the increase in workers' compensation premium caused by injury for which a third party is liable.

S. 100, however, is not designed as a remedy for the "toxic torts" problem, although several of its provisions would come into play in occupational disease tort cases. For example, the statute of limitations in product liability tort cases would run from discovery, rather than last exposure as required in some states at present.

S. 100 seeks to strengthen the tort system by reinforcing its fault-based foundation and by sharpening distinctions between workers' compensation and tort. One way in which S. 100 would accomplish this is by prohibiting worker suits against their employers under the discredited "dual capacity" theory or through the artifice of an action against a third party who may, in a few states, be allowed to implead the employer. These provisions should be extended to cover so-called "intentional tort" and co-employee suits.

Several related provisions in S. 100, however, have proven controversial among our members. The bill would remove the employer's right of subrogation in workers' compensation cases where third party liability may exist and require the trial court in a product case to deduct the amount of workers' compensation which would be payable if the tort plaintiff had filed a workers' compensation claim. These provisions have a direct bearing on tort liability for asbestos-related diseases and could result in shifting liability from manufacturers to employers. More information on the effect of these provisions would be beneficial and this subcommittee could provide invaluable assistance in conducting research on them. Even as we acknowledge the value of additional information on these points, we nevertheless urge Congress to enact S. 100 without further delay.

Finally, we note that in conjunction with product liability tort reform as embraced in S. 100, the Senate Commerce Committee is exploring whether a no-fault product liability compensation remedy would be desired, as suggested by Senators Dodd (D-CT) and Gorton (R-WA). These proposals are conceptually similar to S. 1265, in that they offer a no-fault benefit in lieu of tort rights that would supplement workers' compensation or other existing sources of compensation. Of course, the Dodd and Gorton proposals would apply to all injuries caused by products, not just asbestos-related illness.

The Dodd and Gorton proposals have prompted an effort to develop an alternative, binding arbitration mechanism which would include occupational disease product liability claims. This effort was initiated by Senator Danforth (R-MO).

These and similar proposals are intriguing in that proponents claim they provide a mechanism to protect individuals who otherwise may "fall between the cracks." On the other hand, they also give rise to many difficult problems. For example, to the extent that they would deny workers any right to sue third parties, they raise questions about Constitutionality and the likelihood of public acceptance. We call the Subcommittee's attention to attempts by three states to cut off workers' rights to sue third parties which have failed to pass judicial or legislative muster. We are now reviewing the Danforth, Dodd and Gorton proposals in our policy committee governing product liability and may have a more detailed analysis at a later time.

National Business Council on Injury Compensation

The general subject of unintended injury to people as a result of exposure to hazardous substances is of broad interest to the business community. Examination of the scope of the problem, identification of specifics, and means of dealing fairly with those who might be so injured require the expertise of many disciplines. Two years ago, the Chamber convened what was called the *ad hoc* National Business Council on Injury Compensation to develop recommendations as to how the business community could responsibly respond to problems related to exposure to hazards.

The Council of approximately 45 professionals included experts in law, toxicology, epidemiology, insurance, workers' compensation, chemistry, engineering, consumer product safety, worker safety, environmental management, and more. Most members were drawn from the approximately eight or so policy committees of the Chamber affected by this important issue. Others were added to assure that all necessary disciplines were represented. The Council was chaired by Mr. Van Smith, then Chairman of the Board of the U.S. Chamber, an attorney and small businessman with direct experience in some of the fields of import.

The Council addressed three broad subsets of the subject: (1) the extent of public and private coverage for people harmed through no fault of their own -- including administrative and legal remedies, such as workers' compensation and tort; (2) the relationship between medical causation and law and how to bring the two closer together; and (3) a review of legislative and related proposals to deal with injury compensation.

The Council identified that in 1982 (some statistics were for 1981) first-party insurance and tort payments totaled $142.5 billion, indicating that at least this level of compensation was provided for varying types of disease and injury. Federal government payments alone for health and disability in 1981 were $109.6 billion for some 38.8 million beneficiaries. Approximately 108 million persons were covered by health insurance, 164 million covered for physician's expenses, 158 million by major medical, and 80 million by disability insurance, among others. On the basis of this and other information, the Council found that the present extent of coverage is broad.

A review of the present tort and workers' compensation systems showed both successes and failures in providing recourse for injured parties. Some needed improvements were identified. Both the administrative and tort systems in place today were judged against their intended goals.

At the outset, an attempt was made to identify those groups in our population who may be falling through the safety net of public and private compensation systems. Research showed that this was not possible. However, those caught by this net could be counted (although not unambiguously), and the number is quite high.

The nexus between science and law for the determination of causation was examined. Proper determination of causation is essential in order not to deny those harmed compensation (and treatment) and not to charge falsely those who are not responsible. At the same time, it was recognized that science is rarely able to establish unequivocally causation. Medicine, biology and the related sciences needed to establish causation are complex and incomplete in their understanding of disease etiology and the human body. A patient's medical history and life-style enter into questions of causation as well.

The Council not only called for the wider application of "good science" but also outlined how this might be achieved. Koch's postulates of causation, first published in the last century and updated with the understanding of viral diseases, still hold. The Council outlined how these might be applied in independent determinations of causation and responsibility.

They reasoned that bringing good science into the decisionmaking process will not cure the problem presented by juries who rule for plaintiffs out of sympathy for their injuries or diseases rather than by a weighted conclusion of the defendant's responsibility. This problem should be dealt with by determining causation and responsibility issues first and separately from issues of injury and damages and certainly not in the reverse order. The scientific data needed to establish a standard of scientific proof should consist of adequately controlled studies in animals and/or humans by methods technically and reasonably applicable and acceptable to the professions. Methods for applying this standard and related standards of professionalism to determining causation have been outlined by the Council.

Finally, the Council reviewed and criticized (positively and negatively) several proposals for dealing with injury compensation. Proposals were examined by discussing the spectrum of choices each contains by comparison of trade-offs. There is no inference that any of the trade-offs are necessarily viable or acceptable to any of the participants in the debate but are presented in the report as a means of illustrating the complexities of the issues.

A principal finding was that the new proposals typically confuse or blur the distinctions between fault and no-fault compensation systems. The debate would be clarified significantly if the participants could be persuaded to recognize that there are choices or trade-offs involved in shifting back and forth between the two.

The ad hoc National Business Council on Injury Compensation made several recommendations, which were adopted as policy by the Chamber's Board of Directors. These are included here as Appendix V. We urge the Subcommittee's careful review of the Council's report which has been made available to you.

CONCLUSION

Workers who are disabled by occupational disease should receive compensation and now have access to the workers' compensation and tort systems. Workers' compensation laws provide benefits for occupational diseases when claimants can prove that their disabilities result from workplace exposure. While imperfect, these programs have undergone and continue to undergo major improvements, including their coverage of occupational diseases. The business community is working to facilitate the process of removing restrictions in a handful of state laws that may unfairly prevent payment of compensation for a disease that has a long latency period. Furthermore, there are no "barriers to compensation" in the two federal workers' compensation programs that cover many of the asbestos tort plaintiffs.

There are indeed serious problems with compensating illness related to workplace exposure through the tort system, but these problems are not attributable to workers' compensation, and federalization of workers' compensation will not solve them. The poor record of existing federal programs substantiates our view that workers' compensation should be left to the states.

Reform of the tort system generally is needed to strike a balance among the rights of plaintiffs and defendants, individuals, businesses, and society. The Chamber strongly supports S. 100, the federal Product Liability Act but recognizes that it is not designed to address the particular problems of compensating individuals whose diseases arise after a long latency period and/or have complex or unknown etiology.

We sincerely hope that the ad hoc Council and NAIC reports (along with their recommendations) will assist the subcommittee in illuminating the many complex and often overlapping medical, scientific and legal issues surrounding the occupational disease debate.

Finally, we respecfully urge this Subcommittee -- and the Congress -- to give due consideration and weight to these issues, whose resolution will allow all concerned parties to reach our common goal of providing prompt and equitable compensation to those truly disabled and deserving workers, just as all who are participating in the Wellington Facility are attempting to do.

We stand ready to assist the Subcommittee in the future on these and other issues of concern. Thank you for the opportunity to present our views.

CHART IV COVERAGE OF OCCUPATIONAL DISEASES January 1, 1985

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
ALABAMA	All diseases		Death—within 3 years after last exposure or last payment. Radiation or occupational pneumoconiosis[3]—exposure must occur in at least 12 months over 5 years prior to last exposure.	Disability—within 2 years after last exposure or last payment (radiation—within 2 years and claimant knows/should know relation to employment). Death—within 2 years after death or last payment. Coal miner's pneumoconiosis—within 3 years after total disability or death and claimant knows/should know relation to employment.		Unlimited	Same as for accidents. Coal miner's pneumoconiosis—total disability or death compensated same as Federal Black Lung Act.
ALASKA	All diseases			2 years after knowledge of relation to employment. Within 1 year after death.		Unlimited	Same as for accidents
AMERICAN SAMOA	All diseases	Claimant examined by physician selected by Commissioner.		Within 1 year after claimant knows/should know relation to employment.		Unlimited	Same as for accidents
ARIZONA	All diseases	Board of 3 medical consultants may be appointed by Commission. Report is prima facie evidence of facts.	Silicosis or asbestosis—employer liable only if exposure during 2 years.	Within 1 year after disability or accrual of right, excusable.[4]	Disability payments	Unlimited	Same as for accidents
ARKANSAS	All diseases		Disability or death—within 1 year after last exposure (3 years for silicosis or asbestosis), or 7 years for death following continuous disability. Does not apply to radiation. Silicosis or asbestosis presumed nonoccupational absent exposure in 5 years over 10 years prior to disability (2 of 5 years in state unless same employer).	Disability—within 2 years after last exposure (silicosis or asbestosis—within 1 year from disablement; radiation—within 2 years from diagnosis). Death—within 2 years.		Unlimited	Same as for accidents. Silicosis and asbestosis—partial disability less than 33 1/3% noncompensable.[5]
CALIFORNIA	All diseases. Special account for asbestosis-related disease.			Disability—within 1 year from injury or last payment. Death—within 1 year after death (for death within 1 year after injury), 1 year after last medical payment, or 1 year after death if compensation paid; no proceedings more than 240 weeks after injury except for claims based on asbestos exposure.[6]		Unlimited	Same as for accidents
COLORADO	All diseases		Disability—within 5 years after injury (no limit for radiation, asbestosis, silicosis, or anthracosis). Silicosis or asbestosis—employer liable only if exposure lasts 60 days.	Within 3 years after disability or death (5 years in case of ionizing radiation, asbestosis, silicosis, or anthracosis) or if reasonable excuse.		Unlimited	Same as for accidents
CONNECTICUT	All diseases	Panel of 3 physicians may be appointed by Commissioner to resolve medical issues involving lung disease.		Within 3 years after first manifestation of disease (within 2 years if death occurs within 2 years after first manifestation of disease, or 1 year after death, whichever is later).		Unlimited	Same as for accidents
DELAWARE	All diseases			Disability or death—within 1 year after claimant knows relation to employment.		Unlimited	Same as for accidents
DISTRICT OF COLUMBIA	All diseases			Within 1 year after injury, death, last payment, or knowledge of relation to employment.		Unlimited	Same as for accidents
FLORIDA	All diseases		Death—following continuous disability and within 350 weeks after last exposure. Employer liable for dust disease only if exposure lasts 60 days.	Within 2 years after disablement, death, or last payment.		Unlimited	Same as for accidents
GEORGIA	All diseases	Medical board of 3, finding conclusive.	Within 1 year after last exposure (3 years for byssinosis, silicosis, or asbestosis; 7 years for death following continuous disability). Employer liable for silicosis or asbestosis only if exposure lasts 60 days; presumed nonoccupational absent exposure in 5 years over 10 years prior to disability (2 years in state unless same employer).[8]	Within 1 year after disablement, death, or medical care, or 2 years after last payment.[7] Radiation—within 1 year after onset of disability, and claimant knows/should know relation to employment.[7]	Disability payments	Unlimited	Same as for accidents.[9]
GUAM	All diseases			Within 1 year after injury, death or last payment.		Unlimited	Same as for accidents
HAWAII	All diseases			Within 2 years after claimant knows relation to employment.		Unlimited	Same as for accidents

[1] Employer and insurance carrier at time of last exposure are liable in Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Oklahoma, Tennessee, Vermont, and Virginia. The employer at time of last exposure is liable in Alabama, Arizona, Iowa, Michigan, Missouri, Montana, New Mexico, Pennsylvania, South Dakota, Texas, and Utah. Liability is apportioned among responsible employers in New York and Rhode Island. California limits liability to employer during last year of exposure.

[2] Benefits determined as of the date of last exposure or last injurious exposure in Arkansas, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, New Jersey, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Benefits determined as of the date of disability, knowledge, or manifestation in Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and West Virginia.

Ala. [3] Radiation unless caused by gradual exposure.

Ariz. [4] Limit on filing runs from when injury is manifest or when claimant knows/should know relation to employment; tolled during incapacity.

Ark. [5] Silicosis or asbestosis—worker who is affected but not disabled may leave work and receive up to 26 weeks of benefits plus up to $400 for retraining.

Calif. [6] Date of injury is date of disability and claimant knows/should know relation to employment.

Ga. [7] Byssinosis claims diagnosed before July 1, 1983, must be filed before July 1, 1984.

[8] Year is 200 days exposure over 12 months.

[9] Silicosis or asbestosis—worker who is affected but not disabled may waive full compensation and if later disabled receive benefits up to 100 weeks $2,000.

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
IDAHO	All diseases		Within 1 year after last exposure (4 years for silicosis, 7 years for death following continuous disability). Employer liable for nonacute disease only if exposure lasts 60 days. Silicosis—exposure must occur in 5 years during 10 years prior to disablement (last 2 in-state unless same employer).	Within 1 year after manifestation or death. Silicosis—within 4 years after last exposure. Radiation or unusual disease—within 1 year after incapacity, disability, or death and claimant knows/should know relation to employment.	Disability payments	Unlimited	Same as for accidents. Silicosis—partial disability nonapportionable.
ILLINOIS	All diseases		Disability—within 2 years after last exposure (3 years for berylliosis or silicosis, 25 years for asbestosis or radiation).	Disability—within 3 years after disablement or 2 years after last payment. Death—within 3 years after death or last payment. Coal miner's pneumoconiosis—within 5 years after last exposure or last payment. Radiation or asbestosis—within 25 years after last exposure.	Disability payments but with minimum compensation	Unlimited	Same as for accidents
INDIANA	All diseases		Disablement—within 2 years after last exposure (3 years if caused by asbestos, coal or silica dust); radiation—within 2 years after claimant knows/should know relation to employment. Death—within 2 years after disablement or during pendency of disability claim filed within that period; within 2 years after fixed disability expires but no later than 300 weeks after disablement. Employer liable for silicosis or asbestosis only if exposure lasts 60 days.	Within 2 years after disablement or death	Disability payments	Unlimited	Same as for accidents
IOWA	All diseases	Medical Board may decide controverted medical questions or provide medical examinations for certain employees.	Disability or death—within 1 year after last exposure (3 years for pneumoconiosis, 7 years for death following continuous disability). Pneumoconiosis presumed nonoccupational absent exposure in 5 years over 10 years prior to disability (2 of 5 years in-state); employer liable only if exposure lasts 60 days.	Within 2 years after death or disablement or 3 years after last payment. Radiation—within 90 days after disablement or death and claimant knows/should know relation to employment.	Same as for accidents	Unlimited	Same as for accidents. Pneumoconiosis—partial disability less than 33-1/3% is noncompensable.
KANSAS	All diseases		Disability or death—within 1 year after last exposure (2 years for death from silicosis, 7 years for death following continuous disability). Does not apply to radiation. Silicosis presumed nonoccupational absent exposure in 5 years over 10 years prior to disability (2 of 5 years in-state unless same employer); employer liable only if exposure lasts 60 days.	Within 1 year after disablement, death, or last payment (2 years after last payment in case of silicosis). Radiation—within 1 year after claimant knows/should know relation to employment.		Unlimited	Same as for accidents
KENTUCKY	All diseases			Disability—within 3 years after last exposure or first manifestation. Death—within 3 years, if it occurs within 3 years after last exposure or first manifestation; limit waived where voluntary payment or employer knows of disease and cause. No claim more than 5 years after last exposure (20 years in case of radiation), except for death within 20 years after continuous disability begins in cases where there is award or timely claim for disability.		Unlimited	Same as for accidents. Where disablement occurs after 5 years exposure or results from silicosis or pneumoconiosis, apportioned between employer and Special Fund. Fund pays 75% of cost if not conclusively proven to result from last exposure; otherwise pays 40%. Employer pays balance.
LOUISIANA	All diseases		Diseases contracted in less than 1 year presumed to be nonoccupational. Presumption is rebuttable by "overwhelming preponderance of evidence."	Disability—within 6 months after manifestation, occurrence of disability, or worker knows/should know relation to employment. Death—within 6 months, or within 6 months after worker knows/should know relation to employment.	Same as for accidents	Unlimited	Same as for accidents
MAINE	All diseases		Incapacity—within 3 years after last exposure (does not apply to asbestos-related disease). Employer liable only if exposure lasts 60 days (except for radiation and asbestos-related disease). Silicosis presumed nonoccupational absent in-state exposure in 2 years during 15 years preceding disability (part of exposure may be out of state if same employer).	Within 2 years after incapacity or 1 year after death or last payment (40 years after last payment for asbestos-related disease.) If mistake of fact, within reasonable time but no later than 10 years after last payment. Radiation—time runs from date of incapacity and claimant knows/should know relation to employment.	Disability payments	Unlimited	Same as for accidents
MARYLAND	All diseases			Within 2 years after disablement, death, or actual knowledge of relation to employment; excusable (3 years for pulmonary dust disease).		Unlimited	Same as for accidents
MASSACHUSETTS	All diseases			Within 1 year after injury or death; excusable.	Disability payments	Unlimited	Same as for accidents
MICHIGAN	All diseases			Within 2 years after claimant knows/should know relation to employment.		Unlimited	Same as for accidents

Idaho: Silicosis—worker who is affected but not disabled may waive full compensation and, if later disabled, receive benefits up to $5,000.

Iowa: Death from respiratory disease of coalminer employed 10 years presumed due to pneumoconiosis.

Effective 7/1/84, 33% threshold requirement repealed; benefits now payable are prospective only.

Kan.: Worker who is affected but not disabled may waive full compensation and if later disabled receive benefits up to 100 weeks.

Ky.: Black lung claimant must file under state and federal law.

Me.: Claim for asbestos-related disease contracted between 11/30/67 and 10/1/83 must be filed by 1/1/86.

Md.: Disease or injury compensable under federal law (other than Social Security Disability Insurance) is not compensable.

Mich.: Silicosis, dust disease, and logging industry fund reimburses compensation over $25,000 or 104 weeks, whichever is greater for injury after 6/30/85; also reimburses benefits in cases of exposure to brominated biphenyl before 7/24/79 and where disability or death occurs/becomes known after 7/24/7.

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
MINNESOTA	All diseases			Within 3 years after employee's knowledge of cause of injury or disability		Unlimited	Same as for accidents. Non-disabled claimant eligible for medical services. Supplemental benefits may be payable after 4 years from last exposure
MISSISSIPPI	All diseases			Within 2 years after injury or death	Same as for accidents	Unlimited	Same as for accidents
MISSOURI	All diseases		Last employer liable for silicosis, asbestosis and radiation if exposure lasts 90 days.	Within 2 years after injury, death or last payment (3 years if no injury report filed); limitation runs from date injury is reasonably apparent	Disability payments	Unlimited	Same as for accidents
MONTANA	All diseases	Examinations made by 1 or more members of the occupational disease panel	Death—within 3 years after last employment unless continuous total disability (does not apply to radiation). Silicosis—total disability or death must occur within 3 years after last employment (except for death following continuous total disability), and employer is liable only if exposure lasts 90 workshifts.	Within 1 year after disability and claimant knows/should know relation to employment; may be extended 2 more years. No claim more than 3 years after last employment (except for radiation or death after continuous total disability).	Disability payments	Unlimited	Same as for accidents, excluding partial disability. Worker who is affected but not disabled may leave job and receive compensation up to $10,000. Pneumoconiosis benefits reduced by amount payable under federal law. Benefits for silicosis are supplemented so that combined compensation is $200 monthly; supplement is general revenue financed
NEBRASKA	All diseases			Within 2 years after knew/should have known of injury and relation to employment		Unlimited	Same as for accidents
NEVADA	All diseases	Medical review board selected by director; findings conclusive	Silicosis or respiratory dust disease is noncompensable absent in-state exposure in 3 years during 10 years preceding disability or death	Within 90 days after knowledge of disability and relation to employment or 1 year after death. Silicosis or respiratory dust disease—within 1 year after temporary or total disability or death		Unlimited	Same as for accidents
NEW HAMPSHIRE	All diseases			Within 2 years after injury or death and claimant knows/should know of injury and relation to employment.	Disability payments	Unlimited	Same as for accidents
NEW JERSEY	All diseases			Within 2 years after claimant knows relation to employment or last payment		Unlimited	Same as for accidents
NEW MEXICO	All diseases		Death—within 1 year after last employment (3 years for death following continuous disability) and death must follow disability within 2 years. Silicosis or asbestosis—disability or death within 2 years after last employment (5 years for death following continuous disability); employer is liable only if exposure lasts 60 days; noncompensable absent in-state exposure in 1250 workshifts during 10 years preceding disability. Radiation—disability or death within 10 years after last employment	Within 1 year after disability or death or 1 year 31 days after last voluntary payment. Radiation—within 1 year after disability begins or death and claimant knows/should know relation to employment.	Disability payments	Unlimited	Same as for accidents
NEW YORK	All diseases			Within 2 years after disablement or death, or two years after claimant knows/should know relation to employment		Unlimited	Same as for accidents
NORTH CAROLINA	All diseases	Commission appoints 3-member advisory board for silicosis or asbestosis cases	Death within 2 years after injury, if totally disabled 6 years after injury or 2 years after final determination. Asbestosis—disability or death within 10 years after last exposure; for death following continuous disability, disability must occur within 10 years after last exposure. Lead poisoning—disability or death within 2 years after last exposure; for death following continuous disability, disability must occur within 2 years after last exposure.	Within 2 years after disablement, death, or last payment, or within 2 years of notification by competent medical authority, whichever last occurs. Radiation—within 2 years after incapacity and claimant knows/should know relation to employment		Unlimited	Same as for accidents
NORTH DAKOTA	All diseases		Death—within 1 year after injury if no disability, or 1 year after cessation of disability, or 6 years after injury if disability is continuous.	Within 1 year after injury, within 2 years after death (2 years after injury if no claim prior to death).		Unlimited	Same as for accidents
OHIO	All diseases	Medical specialist in specific cases; findings advisory		Within 2 years after disability or death or within 6 months after diagnosis (whichever is later)		Unlimited	Same as for accidents. No partial disability for respiratory dust disease.

Miss. For radiation, date of disablement is date of injury.

Mo. By court decision. Does not apply to insurer. Bowman v. Certain-Teed Products Corp., 651 S.W.2d 613 (Ct. App. 1984).

Mont. Silicosis is noncompensable absent in-state exposure in 1,000 workshifts during 8 years preceding total disability; claimant who is discharged to avoid liability may receive compensation when totally disabled if employed 750 workshifts.

N.H. Date of injury is last date of exposure or first date worker knows/should know relation to employment.

N.Y. Disability or death due to silicosis or dust disease reimbursed from special fund for all payments over 104 weeks.

N.C. Asbestosis or silicosis is noncompensable absent in-state exposure in 2 years during 10 years preceding last exposure or if exposure is less than 30 working days in 7 consecutive months.

Worker who is affected but not disabled by asbestosis or silicosis or who is removed from exposure receives benefits up to $80 weekly for 104 weeks. If later totally disabled, full compensation is paid. If death results within 2 years after last exposure (350 weeks if caused by secondary infection), full compensation is paid. If partially disabled, 66-2/3% of wage loss is paid for another 196 weeks. If unrelated death, balance of 104 weeks is paid plus 300 weeks (total disability) or percentage of 196 weeks (partial disability). Worker may waive full compensation and receive 104 weeks of compensation plus 100 more weeks if later disabled or dies.

N.D. Date of injury is date on which a reasonable person knows/should know relation to employment.

Ohio Includes asbestosis, silicosis, and coal miner's pneumoconiosis. Worker who is affected but not disabled by respiratory dust disease and leaves employment may receive $49 weekly for 30 weeks, then 66-2/3% of wage loss (not to exceed $40.25 weekly).

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION
OKLAHOMA	All diseases		Employer liable for silicosis or asbestosis only if exposure lasts 60 days	Within 18 months after last exposure or manifestation and diagnosis by a physician, or within 3 months after disablement		Unlimited	Same as for accidents*
OREGON	All diseases			Within 5 years after last exposure and within 180 days after disablement or physician informs claimant of disablement; 10 years after last exposure for radiation disease		Unlimited	Same as for accidents
PENNSYLVANIA	All diseases	Examination by impartial physician may be ordered	Within 300 weeks after last exposure (except death following disability that occurs within 300 weeks after last exposure). Silicosis, anthracosilicosis, or coalminer's pneumoconiosis—noncompensable absent in-state exposure in 2 years during 10 years preceding disability.*	Within 3 years after disablement, death, or last payment. Radiation—within 3 years after the employee knows/should know relation to employment		Unlimited	Same as for accidents*
PUERTO RICO	Diseases as provided by law		Disability—within 1 year after last exposure, except diseases with longer latent periods	Within 3 years from time employee learns nature of disability		Unlimited	Same as for accidents
RHODE ISLAND	All diseases	Director of Labor appoints impartial physician		Within 3 years after disability or death. Radiation—within 1 year after claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents
SOUTH CAROLINA	All diseases	Medical board determines controverted medical questions; pulmonary cases may be referred to pulmonary specialist of state medical universities	Disease must be contracted within 1 year after last exposure (2 years for pulmonary dust disease), except radiation. Byssinosis is noncompensable absent exposure for 7 years	Within 2 years after definitive diagnosis or 1 year after death. Radiation—limitation runs from date of disability and claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents. Worker who is affected but not disabled may waive compensation (except radiation)
SOUTH DAKOTA	All diseases	Division may contract with physicians for reports	Silicosis—noncompensable absent in-state exposure in 2 years; in-state requirement waived if same employer; employer liable only if exposure lasts 60 days	Within 2 years after disability or death. Radiation—within 1 year after disability and claimant knows relation to employment	Disability payments	Unlimited	Same as for accidents. No permanent partial disability for silicosis.*
TENNESSEE	All diseases			Within 1 year after incapacity or death	Same as for accidents	Unlimited	Same as for accidents. Coalminer's pneumoconiosis—same as federal Black Lung Act
TEXAS	All diseases	Provides for medical committee to pass on controverted questions and with power to order examinations		Within 1 year after injury or first distinct manifestation; 1 year after death. May be extended	Same as for accidents		Same as for accidents
UTAH	All diseases	Commission appoints medical panel of 1 or more to report on extent of disability	Partial disability—within 2 years after last exposure. Total disability—within 1 year after last employment; for silicosis, 3 years (uncomplicated) or 5 years (complicated). Death—within 3 years after last employment (5 years for complicated silicosis or death following continuous total disability). Not applicable to radiation. Silicosis—noncompensable absent 5 years in-state exposure in 15 years preceding disability; employer liable only if exposure lasts 30 days	Within 1 year after incapacity or death and claimant knows/should know relation to employment, but no later than 3 years after death. Permanent partial disability—within 2 years	Disability payments	Unlimited	Same as for accidents*
VERMONT	All diseases		Disablement—within 5 years after last exposure. Death—during employment or after continuous disability beginning within 5 years after last exposure, but no later than 12 years after last exposure. Does not apply to radiation	Within 1 year after discovery, death, or last payment. Radiation—within 1 year after first incapacity and worker knew/should have known relation to employment		Unlimited	Same as for accidents. Affected but nondisabled worker may waive full compensation and later receive limited compensation
VIRGIN ISLANDS	All diseases			Within 60 days after disability		Same as for accidents	Same as for accidents
VIRGINIA	All diseases		Exposure in 90 workshifts conclusively presumed injurious exposure	Within 2 years after diagnosis is first communicated to worker, or within 5 years after last exposure, whichever is first.* Within 3 years after death occurring within periods for disability	Disability payments	Unlimited	Same as for accidents.** Worker who is affected but not disabled may waive compensation
WASHINGTON	All diseases			Within 2 years after physician's written notice to claimant		Unlimited	Same as for accidents

Okla. *Worker who is affected but not disabled by silicosis or asbestosis may waive compensation for aggravation of disease and, if later disabled, receive benefits for 100 weeks up to $2,000.

Ore. *Asbestos-related disease—within 40 years after last exposure and 180 days after disability or knowledge of disability.

Pa. *Under Occupational Disease Act, state pays $125 monthly for total disability or death caused by silicosis, anthraco-silicosis, coalminer's pneumoconiosis, or asbestosis, provided there has been 2 years of in-state exposure in cases where the claim is barred by the statute of limitations and the last exposure occurred before 1965 or where exposure occurred under several employers.

S.D. *Worker who is affected by silicosis but not disabled may waive full compensation and if later disabled or dies receive benefits up to 52 times the maximum weekly benefit; if leaves employment, may receive compensation up to $1,000.

Utah *Worker with permanent partial disability who must change occupation may receive up to $1,000 for vocational rehabilitation and retraining, plus compensation of 66 2/3% of average weekly wages up to 66 2/3% of SAWW for up to 20 weeks, then additional compensation (cumulative total may not exceed $2,080).

Va. *5-year limitation does not apply to cataract of the eyes, skin cancer, radium disability, ulceration, undulant fever, angiosarcoma of the liver due to vinyl chloride exposure, or mesothelioma. Byssinosis—within 7 years after last exposure; coalminer's pneumoconiosis—within 3 years after diagnosis; asbestosis—within 2 years after diagnosis, if based on changed condition, within 2 years after diagnosis of advanced stage.

**Compensation for advanced asbestosis based on wages at time of diagnosis if employed in same employment where injurious exposure occurred; otherwise based on average weekly wage of worker in similar employment.

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
WEST VIRGINIA	All diseases	Occupational Pneumoconiosis Board appointed by Commissioner determines medical questions	Occupational pneumoconiosis is noncompensable absent 2 years continuous in-state exposure in 10 years before last exposure or 5 years cumulative in-state exposure within 15 years before date of last exposure	Within 3 years after knowledge or last exposure. Within 2 years after death.		Unlimited	Same as for accidents
WISCONSIN	All diseases	May appoint independent medical expert in doubtful cases		Unlimited. After 12 years claim may be paid with state fund		Unlimited	Same as for accidents
WYOMING	All diseases	Yes		Within 1 year after diagnosis or 3 years after exposure, whichever is last. Radiation—within 1 year after diagnosis or death	Disability payments	Unlimited	Same as for accidents
F.E.C.A.	All diseases			Within 3 years after injury, death or disability and claimant knows should know relation to employment, excusable		Unlimited	Same as for accidents
LONGSHORE ACT	All diseases			Within 1 year after injury, death, last payment, or knowledge of relation to employment		Unlimited	Same as for accidents[1]
ALBERTA	All diseases	Independent medical board may be appointed to report on medical questions and extent of disability		Within 1 year after injury or death, excusable. Silicosis—disablement or death following significant exposure		Unlimited	Same as for accidents
BRITISH COLUMBIA	All diseases	Medical review panel appointed by Lt.-Gov. in Council. Decision final as to medical evidence		Within 1 year after disablement or death, excusable within 3 years[1]		Unlimited	Same as for accidents
MANITOBA	All diseases	Medical or neurosis review panel reports on medical questions. Special panel for silicosis		Within 1 year after injury or death. Silicosis—1 year after last exposure if continuously exposed within 2 years after exam free of disease		Unlimited	Same as for accidents
NEW BRUNSWICK	All defined industrial diseases			Within 1 year after injury or 6 months after death		Unlimited	Same as for accidents
NEWFOUNDLAND	All diseases	Committee of medical referees appointed by Commission		Within 6 months after injury, disablement or death		Unlimited	Same as for accidents
NORTHWEST TERRITORIES	All diseases	Board may require examination by impartial physician		Disability—within 1 year after injury, excusable. Death—within 3 years after last employment and within 3 years after death		Unlimited	Same as for accidents
NOVA SCOTIA	All diseases	Board may appoint medical board to advise on silicosis and coal miner's pneumoconiosis cases	Disablement or death within 1 year after last employment (no limit for radiation)	Within 6 months after injury or death. Silicosis or coal miner's pneumoconiosis—within 5 years after last employment and within 1 year after discovery of relation to employment, excusable but paid only from filing date		Unlimited	Same as for accidents
ONTARIO	All diseases			Within 6 months after injury or death, excusable		Unlimited	Same as for accidents
PRINCE EDWARD ISLAND	All industrial diseases		Disablement within 1 year after last exposure	Within 6 months after injury or death		Unlimited	Same as for accidents
QUEBEC	All diseases in schedule[1]		Disablement within 1 year after last exposure	Within 6 months after injury or death		Unlimited	Same as for accidents except for silicosis or coal miner's pneumoconiosis
SASKATCHEWAN		Medical panel issues final decision on disputed medical questions	Disablement within 1 year after last exposure	Within 6 months after injury or death		Unlimited	Same as for accidents
YUKON TERRITORY	All diseases	Disputes may be referred to 1 practitioner for decision	Death—3 years after last exposure[1]	Disability—1 year after last exposure		Unlimited	Same as for accidents
CANADIAN MERCHANT SEAMEN'S ACT	All diseases	Disablement in the course of employment, otherwise than as a result of an accident, is compensated as for an accident.					

Longshore: [1]In permanent partial disability claims due to occupational disease where times of injury occurs after retirement, compensation is 66⅔ of average weekly wage times percentage of permanent impairment (according to AMA guidelines), payable while impairment continues.

B.C.: [1]After 3 years, compensation is payable only from date of filing.

Quebec: [1]Certain diseases are presumed caused by work exposure, as provided in schedule.

Yukon: [1]Within 3 years after accident in last case if proof is filed with Commissioner.

Appendix II

WORKERS' COMPENSATION -- TOTAL DISABILITY
MAXIMUM WEEKLY BENEFIT FOR INDIVIDUAL, NO DEPENDENTS

	MAXIMUM	PERCENTAGE OF STATE AVERAGE WEEKLY WAGE
ALABAMA	$ 290	100%
ALASKA	1114	200%
ARIZONA	204*	
ARKANSAS	154	
CALIFORNIA	224	
COLORADO	316*	80%
CONNECTICUT	381	100%
DELAWARE	232*	66 2/3%
DISTRICT OF COLUMBIA	413*	100%
FLORIDA	307	100%
GEORGIA	135	
HAWAII	291	100%
IDAHO	261*	90%
ILLINOIS	492*	133 1/3%
INDIANA	166	
IOWA	580	200%
KANSAS	227	75%
KENTUCKY	305*	100%
LOUISIANA	248	66 2/3%
MAINE	448*	166 2/3%
MARYLAND	327	100%
MASSACHUSETTS	341*	100%
MICHIGAN	358	90%
MINNESOTA	329	100%
MISSISSIPPI	126	
MISSOURI	223	66 2/3%
MONTANA	286	100%
NEBRASKA	200	
NEVADA	325*	100%
NEW HAMPSHIRE	440	150%
NEW JERSEY	269	75%
NEW MEXICO	299*	100%
NEW YORK	275	
NORTH CAROLINA	282	100%
NORTH DAKOTA	285	100%
OHIO	354	100%
OKLAHOMA	217	66 2/3%
OREGON	324*	100%
PENNSYLVANIA	336	100%
RHODE ISLAND	292	100%
SOUTH CAROLINA	287*	100%
SOUTH DAKOTA	247	100%
TENNESSEE	136	
TEXAS	203	
UTAH	TT-310 PT-264	TT-100% PT-85%
VERMONT	278	100%
VIRGINIA	295	100%
WASHINGTON	256*	75%
WEST VIRGINIA	321*	100%
WISCONSIN	321	100%
WYOMING	TT-347 PT-232	TT-100% PT-66 2/3%
LONGSHORE	580*	200% of National Average Weekly Wage
FECA	980*	

*Rounded to nearest dollar

PREPARED BY: SAMUEL A. ROTH, ASSOCIATE MANAGER, EMPLOYER RELATIONS
CHAMBER OF COMMERCE OF THE UNITED STATES (202) 463-5514

Appendix III

RESOLUTION
WORKERS' COMPENSATION (D) TASK FORCE
OF THE
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

WHEREAS, the Workers' Compensation (D) Task Force (hereinafter "Task Force") of the National Association of Insurance Commissioners (NAIC) appointed an Advisory Committee to study occupational disease issues because of the Task Force's concern about the ability of the present workers' compensation system to respond adequately to future occupational disease claims; and

WHEREAS, the NAIC Occupational Disease Advisory Committee has completed its study and is commended for its thorough and excellent report; and

WHEREAS, the Task Force acknowledges with appreciation the assistance of the International Association of Industrial Accident Boards and Commissions (IAIABC) in this regard and looks forward to future joint efforts with the IAIABC concerning vital workers' compensation issues that are of mutual concern; and

WHEREAS, the Task Force supports the continuation of the state workers' compensation system; and

WHEREAS, there is an ongoing need for the states to consider how the coverage and administrative provisions of their workers' compensation laws should be modernized.

NOW, THEREFORE, BE IT RESOLVED that the Task Force believes that consideration should be given by states to the legal and administrative recommendations developed by the Advisory Committee. The retroactive application of these recommendations, however, is inappropriate unless special funding methods are established.

BE IT FURTHER RESOLVED that the Task Force, after reviewing the Advisory Committee's comprehensive and indepth analysis of occupational disease funding issues, believes that the Advisory Committee's recommendations for coping with an unexpected emergence of occupational disease claims deserve consideration by concerned states and private parties.

BE IT FURTHER RESOLVED that the Task Force urges regulators, legislators, and others to remain alert to new developments and new information regarding occupational disease that could create significant pricing and funding problems for insurers and self-insurers and to be prepared to take timely action to assure the continued financial integrity of the workers' compensation system.

FINALLY, BE IT FURTHER RESOLVED that the Task Force agrees with the Advisory Committee that the proper relationship between tort and workers' compensation remedies is important for the preservation of the state workers' compensation system and the exclusive remedy doctrine. Accordingly, the Task Force recommends that the NAIC request the Commercial Lines - Property and Casualty (D) Committee to appoint an interdisciplinary advisory committee to examine the appropriate interface between the tort and workers' compensation systems unless the Committee finds that other studies are covering this subject adequately.

MINUTES
THE WORKERS' COMPENSATION (D) TASK FORCE
KANSAS CITY, MISSOURI
JUNE 12, 1985

The Workers' Compensation (D) Task Force met in the Chicago Room of the Hyatt Regency in Kansas City, Missouri, at 12:00 noon on June 12, 1985. A quorum was present and S. David Childers chaired the meeting. The following task force members or their representatives were present:

S. David Childers, Chair (Arizona); Vicente B. Jasso, Vice-Chair, (New Mexico); Peter W. Gillies (Connecticut); Bill Gunter (Florida); Mario R. Ramil (Hawaii); Wayne L. Soward (Idaho); Gil McCarty (Kentucky); James P. Corcoran (New York); Thomas P. Fox (Wisconsin).

1. Resolution Regarding the Occupational Disease Advisory Committee Report

   The Chair stated he had called a second meeting of this task force for the purpose of reviewing a draft resolution accepting the report submitted by the Occupational Disease Advisory Committee on June 9, 1985. A brief discussion of the resolution ensued.

   Upon a motion duly made and seconded, the Task Force accepted the Committee's report and adopted the resolution (see Attachment "A").

Having no further business, this meeting was adjourned at 12:10 p.m.

S. David Childers, Chair, AZ	Wayne L. Soward, ID
Vicente B. Jasso, Vice-Chair, NM	Gil McCarty, KY
Peter W. Gillies, CT	Theodore T. Briggs, ME
Bill Gunter, FL	James P. Corcoran, NY
Mario R. Ramil, HI	Thomas P. Fox, WI

A signature on an NAIC report warrants that the report fairly and accurately represents the proceedings of the meeting. It does not imply agreement with the substance of the report.

Appendix IV

LET'S REBUILD AMERICA
Chamber of Commerce
of the United States
1615 H Street, N.W.
Washington, D.C. 20062

NEWS
RELEASE

FOR MORNING RELEASE
Thursday, November 17, 1983

Contact: Frank Benson
(202) 463-5682

U. S. CHAMBER BOARD CALLS ON BUSINESS TO BACK NEEDED CHANGES IN STATE LAWS COVERING OCCUPATIONAL DISEASE COMPENSATION

WASHINGTON, Nov. 16 — Individual businesses as well as business groups across the nation should work for enactment of appropriate improvements in their state workers' compensation laws governing occupational disease where needed, the U.S. Chamber of Commerce is urging its members.

At the regularly scheduled fall meeting of the Chamber's 65-member Board of Directors last week, the policy-setting arm of the business federation called on its members to back appropriate reforms of their state occupational disease laws, and to use their "best efforts" to bring about legislative enactment of such reforms.

The Chamber Board adopted this stance acting on the recommendation of its Employee Benefits Committee and the Committee's Council on Workers' Compensation. Official Chamber policy previously called on members of the business organization to "use their best efforts to see to it that workers' compensation laws are in accord with modern concepts."

An updated review of the workers' compensation field, explained Jeffrey Joseph, led the Council to the conclusion "that necessary changes (in state workers' compensation laws) will be relatively modest." The Council "has concluded that workers' compensation laws do a much better job of compensation for occupational disease than their critics give them credit for," added the Chamber vice president for domestic policy. However, it is necessary to remove the appearance of unfairness to short-circuit efforts to federalize the workers' compensation system, he explained.

The formal policy statement adopted unanimously by the Chamber Board reads:

"The Chamber of Commerce of the United States recommends to its members that appropriate reforms of state occupational disease laws be supported where needed and that its members further use their best efforts to facilitate the enactment of these reforms."

According to Eric Oxfeld, the Chamber's employee benefits attorney and staff executive for the Council on Workers' Compensation, the Chamber plans to launch a major initiative along these lines. The organization's extensive communications network will be utilized to publicize the message through letters to members, articles in the Chamber's periodic publications, programming on the organization's television and radio networks and possibly one or more conferences on the issue.

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Appendix V

RECOMMENDATIONS OF THE AD HOC NATIONAL BUSINESS COUNCIL ON INJURY COMPENSATION

In a technologically advanced society, individuals can be exposed to hazards that may result in acute or chronic injury due to no fault of their own. It is a long-standing tradition of American society to seek to ensure that injured individuals are cared for and appropriately compensated. The U.S. Chamber supports the continuation of this tradition as an important element of a society that places a high value on fairness and the well-being of its people.

There are numerous remedies presently available to the American public to provide compensation for injury. These existing compensation systems include common law tort liability and its statutory derivatives, statutory no-fault administrative systems, hybrid statutory and common law remedies, contractual insurance coverages, and a wide variety of taxpayer and industry financed public programs.

Viewed against their intended goals, the U.S. Chamber believes that each of these systems works reasonably well for most Americans. At the same time, improvements are needed, such as in the tort and workers' compensation systems. Also adjustments in one or more of the other systems may be appropriate to rectify specific inadequacies, and ensure that those deserving compensation, but not receiving it, do. The U.S. Chamber encourages modifications, where necessary, at the appropriate level of government, that will achieve improvements without jeopardizing the entire foundation of these well-established compensation systems.

In determining compensation for injury, questions of causation need to be addressed. The extent to which these questions are adequately answered is a measure of both the fairness of the system for the parties involved, as well as of the degree to which the system meets society's injury compensation goals. Greater attention and effort must be applied to join the requirements of both administrative and legal compensation systems with the requirements of science in determining injury causation. The U.S. Chamber supports efforts to better clarify and refine the nexus between science and law in determining compensation and encourages its members to work with the public, the scientific community, and government to achieve this goal.

When determining modifications that may be necessary in existing compensation systems, and in evaluating the need for any new system, careful consideration must be given to the intended purposes of each and the trade-offs that may be involved in selecting among various injury compensation policy options. The Chamber offers the following principles to guide the evaluation and selection of new proposals, or modifications to existing compensation systems.

- Most existing compensation systems fall into one of two categories:

    - fault-based systems, in which individuals who are harmed by the fault of another are compensated by the wrongdoer; or
    - no-fault systems, in which individuals who are harmed are compensated without regard to fault.

  Compensation systems developed under the first category are designed to perform different functions than those of the second. These distinctions are important and should be maintained.

- The tort liability system is no longer the only means of assuring compliance with societal norms. Other societal institutions also play a significant and increasing part in setting and enforcing standards of behavior. Therefore, compensation systems should not be viewed or used as the primary means to punish, blame, or prevent socially unacceptable conduct.

- Distinctions must be made between the desire to compensate and punish harmful conduct that is wrong, and to compensate for the consequences of harmful conduct that is not wrong. Affixing blame and assessing damages to punish and deter harmful conduct where fault is not at issue are inconsistent and inherently unfair.

- Balance must be struck among the level of proof required of claimants, the amount of blame attached to defendants, and the amount of compensatory awards. A fair and practical compensation system must consider the trade-offs that exist among the often competing interests of damages allowable, proof of causation requirements, evidentiary standards, the exclusivity of remedies, and who should pay. In order for a system to be workable and fair, both plaintiffs and defendants will have to balance these choices.

- Compensation systems must recognize that, while innocent defendants should not be punished, innocent claimants may well have legitimate needs which require compensation.

- Where compensation costs are imposed on industry, there must be recognition that these extra costs may have adverse social consequences. These social consequences must be considered and balanced against the need and purpose of any new proposals or modified compensation systems. Efforts must be made to minimize aggregate costs and eliminate excessive transaction costs.

- Because financial resources are finite, the types and amounts of compensatory awards allowable under any one or a combination of compensation systems must be chosen carefully and weighed against other important resource commitments deemed necessary by society. Policy choices must recognize that resource commitments in one area may foreclose commitments in other important areas.

Statement of Melvin H. Roots
General President
Operative Plasterers and Cement Masons International Union

Before the Subcommittee on Health
Senate Committee on Finance
September 9, 1985

Mr. Chairman and members of the committee. I am pleased to have this opportunity to share with you the views of my union on the very important question of compensation for the victims of asbestos disease and other job-related diseases.

The Operative Plasterers and Cement Masons International Union represents 60,000 workers in the construction industry. Most all of our members are plasterers and cement masons. Many have been exposed to significant quantities of asbestos over the years. For a long time, asbestos was a common ingredient in many of the materials we worked with.

In fact, much of the sprayed-on asbestos material that is causing so much concern today in schools and other buildings was originally applied by members of our union. I can tell you from my own personal knowledge that the men who did that work were not warned about the dangers they faced. If they had respirators at all, they were not adequate to protect them from asbestos cancer. They usually wore their work clothes home, and unknowingly contaminated their wives and children.

Today, many of our members are suffering with asbestosis and asbestos-related cancers. I personally have lost friends who have fallen victim to cancer because of the asbestos they breathed for years on the job.

A recent study by NIOSH, based on records supplied by our union, indicates that plasterers have a significantly higher risk of dying from respiratory cancer than our neighbors.

The tragedy of asbestos related disease is often accompanied by economic tragedy. The expenses related to the disease, coupled with the loss of income, place a tremendous financial burden on the victims' families.

State workers' compensation laws have not come close to providing fair and adequate compensation for these families. A study by Dr. Selikoff and his colleagues at Mt. Sinai School of Medicine a few years ago documented the fact that workers' compensation was insignificant as a source of financial support for asbestos victims and their families. And a report published earlier this year by the Office of Technology Assessment states that in 1980, in 29 states surveyed, there were only 234 workers' compensation cases for cancer. That is less than one-tenth of the estimated number of asbestos cancer deaths in the building trades alone.

The time has come to face the facts. State workers' compensation systems are geared to on-the-job injuries. They do not work for victims of occupational diseases that show up years after exposure. What we need is a new system — a national system — designed from the ground up to provide fair and adequate compensation for occupational disease victims and their families. Here are what we see as some of the essential features of a new system:

It should be accessible:

- Filing time limits should be realistic, in view of the long latency periods often involved in occupational diseases.
- People should be able to apply for compensation to one agency. They should not be put through a run-around between different federal and state agencies.
- There should be a set of presumptions that certain diseases are linked to on-the-job exposures —rather than making a widow bear a burden of proof about what her husband was exposed to 25 years ago.

It should fairly and adequately compensate disease victims and their families for the losses they suffer. We have looked at the funding provisions in S-1265. The amount of compensation will vary considerably from state-to-state. But as we understand it, the maximum that could be received by an asbestos victim during his lifetime, and his family after his death, would average out to about $35,000. In some states it could be as little as $26,000. We do not consider that a very generous amount.

It should be adequately funded, by those who caused the problem. The greatest financial burden should fall now on those companies who reaped profits from their sales of dangerous materials for years and grew into multinational corporations on the basis of those profits. The last employer, who usually bears the brunt under workers' compensation, is often one of the least responsible in occupational disease cases. Nor should the American taxpayers bear the cost to "bail out" companies who profited from selling dangerous products.

Healthy corporations should not be allowed to escape their financial responsibilities for occupational diseases by hiding behind our bankruptcy laws. This is one of the most obscene legal maneuvers that we have witnessed.

It should provide mechanisms to extend coverage to occupational diseases other than those linked to asbestos. We know that any national compensation program that is enacted will start out as essentially an asbestos program. But we also know our members, and other workers, are exposed to other health hazards besides asbestos. And as the technology in our trades advances, we recognize that new materials may bring new hazards. The bill that emerges from this committee's deliberations should provide orderly mechanisms to eventually compensate other occupational disease victims, so that we can avoid future situations like the one we now face with asbestos.

We have reviewed the bill before you, S-1265, and found that it misses the mark in most of the areas of concern which I have outlined for you today. I recommend that the Committee consider as an alternative, HR 3090, the Occupational Disease Compensation Act of 1985, introduced by Congressman Pat Williams.

Mr. Chairman, I want to express my gratitude, on behalf of the Operative Plasterers and Cement Masons International Association for the opportunity to state our views on this very important matter. I hope that your deliberations will soon result in a fair, effective national solution to the problem of occupational disease compensation, and that my remarks will have contributed in some small part to that effort.

Thank you.

STATEMENT OF

JOE G. HOLLINGSWORTH
SPRIGGS, BODE & HOLLINGSWORTH
WASHINGTON, D.C.

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON FINANCE
SUBCOMMITTEE ON HEALTH

SEPTEMBER 9, 1985

Mr. Chairman, Members of the Subcommittee: My name is Joe G. Hollingsworth. I am a partner in the law firm of Spriggs, Bode & Hollingsworth of Washington, D.C.

For more than two years, our firm has represented UNR Industries, Inc., of Chicago, Illinois ("UNR"), in the assertion of legal claims against the United States Government, for the staggering losses which it has incurred in the defense, settlement and satisfaction of judgments in thousands of asbestos-related lawsuits which have been brought by federal and government-contract shipyard workers who have been injured as the result of the actions (and the omissions) of the United States Navy and other federal agencies.

For nearly four decades, UNR distinguished itself as a leading supplier of strategically critical insulation products to the United States Navy for use in the construction and repair of United States naval and merchant vessels. During that entire period of time, the asbestos-containing insulation products manufactured and sold by UNR to the Navy (and to private shipyards operated for the benefit of the United States, pursuant to government contracts) were subject to -- and at all times manufactured with unfailing compliance with -- mandatory government contract specifications which (expressly, in most instances) required the use of asbestos as a principal ingredient. Throughout and following World War II -- during which time the federal government asserted complete control over the importation, distribution and use of asbestos in this country -- UNR was repeatedly commended for its extraordinary contributions first to the war effort and, later, to the Nation's defense in the post-war period. Ultimately, however, the "reward" which has been bestowed upon UNR for those contributions has not taken the form of awards, commendations or even profits. UNR's reward, rather, has been the institution of thousands of personal-injury lawsuits by federal and government-contract shipyard workers around the country. So severe has the burden of that litigation been in recent years that UNR has been forced into reorganization proceedings under the bankruptcy laws of the United States.

UNR has instituted legal actions against the federal government -- the party which caused the phenomenal increase in the use of asbestos in this country in the 1930's and 1940's; the party which (despite extensive knowledge of the dangers of occupational exposure to asbestos) persisted for more than 40 years in requiring the use of large quantities of asbestos in all insulation products used at the Nation's shipyards; and the party which, for more than 40 years, ignored its own safety rules and regulations and thereby knowingly exposed thousands of shipyard workers to unsafe concentrations of asbestos dust.

* * * *

Mr Chairman, I believe that the moral responsibility of the United States to participate in the resolution of the national asbestos crisis -- a crisis largely of the federal government's own making -- is clear. I am confident also that the legal responsibility of the Government will ultimately be established in the courts. I am concerned, however, that the efforts of companies such as UNR to pursue their legal claims against the United States have themselves become a major drain upon the limited resources of those companies. I am concerned also about the fact that the United States, through the Department of Justice, has decided to wage a long-term war of attrition, advocating hypertechnical -- and often contradictory -- positions designed not to absolve the Navy or other agencies from blame in this situation, but rather to avoid judicial scrutiny altogether on procedural and jurisdictional grounds and on the basis of questionable claims of sovereign immunity. Mr. Chairman, legislation such as S.1265 has the potential of putting an end to all such costly and wasteful litigation.

What distinguishes S.1265 from earlier versions of proposed legislation designed to deal with the asbestos crisis is its forthright recognition of the fact that the United States -- whether intentionally, negligently or innocently -- did play a major role in the exposure of thousands of individuals to asbestos. Without assessing blame or hurling accusations, it seeks to draw into the solution of this unprecedented problem all of the elements of our society which contributed to the creation of the problem in the first place. We applaud that fair-minded and even-handed approach to this otherwise perhaps insoluble situation.

Mr. Chairman, in the balance of my remarks, I will outline for the Members of the Subcommittee both the nature of the manufacturer's legal claims against the Government and the Justice Department's response (or, perhaps more appropriately, its lack of response) to those claims. I believe that such a discussion will serve to illustrate both the bases upon which legal responsibility of the United States is predicated in this matter and the very serious drain of resources which is being occasioned by the Government's hardline efforts to avoid legal scrutiny of the merits of the manufacturers' claims.

* * * *

UNR's legal claims against the United States are currently being pursued under the Tucker Act, 28 U.S.C. § 1346(a)(2), and under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-1680.

The Tucker Act confers upon the United States Claims Court exclusive jurisdiction over all contract claims against the United States in excess of $10,000. UNR's Tucker Act claims against the Government -- like those of other former asbestos-product manufacturers -- arise out of the Government's breach of contractual obligations undertaken by the Government in the course of its design and procurement of insulation products from the plaintiff manufacturers. Among other things, UNR alleges that the United States, under well-established principles of federal government contract law, warranted that products manufactured in compliance with mandatory contract specifications developed, promulgated and contractually enforced by the Navy (and other government agencies) would be safe for their intended use.

Last year, the Government moved, and the Claims Court ruled (over the manufacturers' objections) that the Tucker Act cases of several former asbestos-product manufacturers (including UNR) be consolidated for purposes of discovery. Extensive discovery efforts have since been instituted by the Government.

We (along with counsel for the other manufacturers which are asserting contract claims against the Government) have made every effort to expedite the pending Claims Court litigation, but those efforts have been resisted by the Government. Recently, for example, counsel for the Government indicated that the United States would not be ready for trial until 1987. Hopefully, the Claims Court will not permit this litigation to drag on for another two years.

UNR's tort claim -- which is being pursued under the FTCA -- arises from the fact that the United States acted wrongfully and negligently in, among other things, (i) requiring the use of asbestos in its insulation products despite knowledge of the health risks attendant to such use,

(ii) knowingly creating and maintaining grossly unsafe working conditions at the Nation's shipyards and aboard naval and merchant vessels, and (iii) failing to warn its shipyard workers of the known dangers of asbestos products or provide available protective equipment and procedures.

Different legal principles govern those cases arising out of federal shipyards than govern cases which arise out of privately owned government-contract shipyards. In the federal shipyard context, the Government is charged with wrongful and negligent acts and omissions (i) under state law in its capacity as the employee of the injured shipyard workers and (ii) under federal maritime law in its capacity as owner of the vessels on which those workers worked. In the private shipyard context, the Government is charged (i) under state law as the party which, by regulation and contract, had and exercised control over working conditions at the shipyard and (ii) under federal maritime law in its capacity as vessel owner.

UNR filed its FTCA administrative claim in February 1984, providing detailed factual information concerning underlying personal injury cases filed against UNR by former government and government-contract shipyard workers. UNR's administrative claim was rejected out of hand by the Government, as it has every other FTCA administrative claim filed by manufacturers. Importantly, the Government's rejection of UNR's claim was not based upon a dispute over the existence of facts presented by UNR. Instead, the Government has thusfar successfully avoided having to address the merits of UNR's FTCA administrative claim by contending that such claim provides inadequate information concerning underlying cases. The Government's refusal to even investigate the possibility of a voluntary settlement of UNR's FTCA administrative claim means that UNR must shortly file a costly, potentially wasteful lawsuit against the Government.

* * * *

Mr. Chairman, I think that a bit of background information will help the Subcommittee appreciate the abusiveness of the tactics being employed by the Justice Department in its treatment of the manufacturers' FTCA administrative claims.

By its enactment of the FTCA in 1946, Congress waived the sovereign immunity of the United States, and conferred upon the federal district courts jurisdiction over tort suits against the federal government. Under the FTCA as originally enacted, a person whose tort claim against the government was for $2,500 or less had the option of seeking voluntary administrative settlement of his claim pursuant to 28 U.S.C. § 2672 or of proceeding directly to initiate a lawsuit in district court pursuant to 28 U.S. § 1346(b). A person whose claim exceeded $2,500 had no choice but to file suit, since an affected agency's authority to settle claims was limited by 28 U.S.C. § 2672 to $2,500.

By 1966, it had become apparent that the inability of agencies to settle meritorious claims for more than $2,500 -- and the consequent necessity of a claimant's initiating federal court action for claims in excess of that amount -- resulted in unnecessary litigation which imposed undue burdens upon the federal courts and undue delay and expense upon claimants. The Senate Judiciary Committee expressed concern about the fact that,

> even if the agency finds that it is clearly liable and desires to settle the claim quickly in the interest of justice and fairness, it cannot do so if the claim is for much more than $2,500. Rather, a suit must be filed and a settlement negotiated after the action is begun in a U.S. district court. [S. Rep. No. 1327, 98th Cong., 2d Sess. (1966 , reprinted in [1966] U.S. Code Cong. & Admin. News 2515, 1517.]

To remedy this situation, Congress amended the FTCA in 1966. As explained in the accompanying Senate Report, the purpose of those amendments was to

> provid[e] for more fair and equitable treatment of private individuals and claimants when they deal with their Government or are involved in litigation with their Government. . . . The [amendments] are intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. [Id., [1966]. U.S. Code Cong. & Admin. News, at 2516.]

In order to achieve this result, Congress (i) eliminated the $2,500 limitation on the agencies' settlement authority, and (ii) required that all tort claims be submitted initially to the affected agency for possible settlement. If the agency denies the claim -- or if the agency fails to act within six months -- then the claimant may file suit in district court.

The entire purpose of the 1966 FTCA amendments was to facilitate matters by permitting the voluntary settlement of easy cases in which the agency chooses not to contest liability. Mr. Chairman, in its treatment of the asbestos-product manufacturers' claims, the Justice Department has turned the 1966 amendment of 28 U.S.C. § 2675(a) on its head. In every instance, the Department of Labor (the agency to which all such claims have been referred by the Justice Department) has refused to take any action on -- even to deny -- the manufacturers' claims. Rather, it has taken the position that all of the manufacturers' voluminous claims have failed to provide sufficient detail to permit the Government to investigate the possibility of settling those claims. Thus, the Justice Department has argued, no "notice" has been given under 28 U.S.C. § 2675(a). That position has been advanced successfully (disingenuously, we maintain) in at least two such FTCA cases here in the District of Columbia. The fact of the matter is, Mr. Chairman, that the Justice Department succeeded in pulling the wool over the court's eyes. (Both of those cases are now on appeal to the United States Court of Appeal for the District of Columbia Circuit.)

Mr. Chairman, the Justice Department is singing two different and discordant songs -- one to the courts, yet another to the Congress. To the courts, it says that the manufacturers have failed to satisfy the procedural requirements of the FTCA and that it (the Government) cannot therefore decide whether to settle or to deny the manufacturers' claims because -- and I quote here from the Government's brief to the court in one of the FTCA cases to which I referred a moment ago -- "the United States cannot evaluate the manufacturer's claim intelligently and realistically based upon the skeletal information provided in its administrative filing." The fact of the matter is that -- despite its dilatory protestations to the contrary in its court papers -- the Government has already decided that it will not under any circumstances settle that manufacturer's (or any other manufacturer's) tort claims, including UNR's. Reference to the Justice Department's request to the Congress for Fiscal Year 1986 budget authorization makes this point perfectly clear -- and unequivocally belies the position it has taken in the courts. Again, I quote:

> The [Civil] Division has mounted an aggressive defensive campaign and implemented a policy of rejecting any and all asbestos settlement offers. The results to-date are impressive. . . . This record was achieved in the face of a rapidly expanding caseload and prior to the recent addition of adequate staff necessary to manage and conduct a centralized asbestos defense effort. With the infusion of additional personnel and state-of-the art application of automated litigation support to facilitate storage and retrieval of the vast asbestos document collection, the [Torts] Branch is mounting an

> aggressive, nationwide defense to the challenge to the public treasury by the asbestos industry and its insurers.

In other words, the Justice Department is spending millions of dollars on -- and committing itself to the expenditure of many more millions of dollars to -- an all-out asbestos-litigation war. I submit, Mr. Chairman, that that money -- and the additional millions of dollars now being expended by the manufacturers in pursuant of their meritorious tort claims against the Government -- would be better spent by participation in a compensation fund such as that envisioned by the sponsors of S.1265. If the asbestos litigation explosion has demonstrated anything, it has shown the wastefulness of endless litigation for litigation's sake. Enactment of S.1265 would be the most productive and significant action possible if we as a Nation are truly committed to the prompt and fair compensation of asbestos victims.

* * * *

In conclusion, Mr. Chairman, we urge prompt and favorable consideration of S.1265 by this Subcommittee.

We thank you for the opportunity to express these views.

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